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No.

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IN THE

Supreme Court of the United States

October Term, 1982

THOMAS W. CULLEN, JR.,
Petitioner,

vs.

BMW OF NORTH AMERICA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented.

The petitioner recovered a judgment in the United States District Court for the Eastern District of New York in the sum of $18,000 against the respondent, BMW of North America, Inc. This judgment was reversed by the United States Court of Appeals in a split decision. The petitioner purchased a new BMW motor vehicle from Bavarian Auto Sales an authorized franchisee-dealer of the respondent. The petitioner paid $18,000 for the new car. He never received the new vehicle and he never received a return of his $18,000 payment. This lawsuit was then commenced against the respondent-franchisor and recovery in the lower court was premised upon the theory that the respondent-franchisor was negligent in the financial monitoring of the dealer. The lower court found that the misconduct of the dealer resulting in the petitioner's loss of $18,000 was foreseeable based upon the financial history and the detached indifference of the franchisor to the continuing financial misconduct of the dealer. The United States Court of Appeals in reversing the judgment for the petitioner ruled that the misconduct of the dealer in causing petitioner to suffer an $18,000 loss was not foreseeable. Judge Oakes in a dissenting opinion in harmony with the lower court held that such misconduct of the dealer based upon all the facts was foreseeable. In addition, Judge Oakes stated that foreseeability was a question of fact and, as it was not clearly erroneous under Section 52(a) of the Federal Rules of Civil Procedure, the Court did not have the jurisdiction nor the power to set the verdict aside. Interestingly enough, the United States Court of Appeals in its decision of reversal made no specific mention of any finding that foreseeability was a factual issue that was clearly erroneous, which finding is

indispensable for the United States Court of Appeals to reverse the judgment in favor of the petitioner upon the facts. The following questions are presented:

1. Did a majority of the United States Court of Appeals violate Rule 52(a) of the Federal Rules of Civil Procedure in reversing the lower Court's finding in favor of the petitioner and dismissing the complaint?

2. Did the decision of the United States Court of Appeals violate Rule 17 of the Rules of the Supreme Court of the United States by departing from the accepted and usual course of judicial proceedings?

3. Was the decision of the United States Court of Appeals reversing a judgment for the petitioner in direct conflict with a recent United States Supreme Court decision in *Pullman-Standard v. Swint,* decided April 27, 1982, No. 80-1190, 50 U.S.L.W. 4425-4429?

4. Was the novelty of the lower Court decision an unmentioned influencing factor in the reversal of the lower Court opinion by the United States Court of Appeals?

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BMW OF NORTH AMERICA, Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Thomas W. Cullen, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on October 13, 1982.

Opinions Below.

The decision and order of the United States Court of Appeals for the Second Circuit dated October 13, 1982,

and reported in 691 F2d 1097, is reproduced as Appendix "A" hereto.

The order of the United States Court of Appeals dated December 6, 1982, which denied petitioner's application for a re-hearing, with Judge Oakes dissenting, is reproduced as Appendix "B" hereto.

The decision and order of the Honorable Edward R. Neaher of the United States District Court dated January 29, 1982, and reported in 531 F Supp 555 is reproduced as Appendix "C" hereto.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 13, 1982. A timely petition for re-hearing and suggestion that re-hearing be held In Banc, was denied on December 6, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Statutory and Text Provisions Involved.

1. Rule 52(a) of the Federal Rules of Civil Procedure states:

> "Rule 52. Findings by the Court
>
> "(a) Effect
>
> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions

of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

2. Rule 17 of the Rules of the Supreme Court states:

"RULE 17

"1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in

conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Statement of the Case.

The facts of the case are as follows:

On January 24, 1979, the petitioner purchased a BMW motor vehicle from Bavarian Auto Sales, a franchised dealer of the respondent. Petitioner paid $18,000, never received the automobile and never received the return of his payment. The dealer went out of business. Petitioner then brought a claim out of which this litigation arose against the franchisor, the respondent herein, to recover the $18,000 payment. The theory of responsibility was that the respondent was negligent in the financial monitoring of its dealership and that the loss sustained by the petitioner was foreseeable based upon the financial history of the dealer, all of which was known to the respondent-franchisor.

Judge Neaher in the lower Court granted judgment in favor of the petitioner upon the theory that the respondent was negligent in the monitoring and supervision of its dealer and that the dealer's misconduct was a foreseeable consequence based upon the financial history.

The United States Court of Appeals, by a 2-1 vote, reversed the judgment for the petitioner and dismissed the complaint holding that the taking of $18,000 of petitioner's money by the dealer was not a foreseeable event. HOWEVER, IN REVERSING, THE UNITED STATES COURT OF APPEALS NEVER STATED THAT IT WAS REVERSING UPON THE GROUND THAT THE FINDING OF FORESEEABILITY WAS "CLEARLY ERRONEOUS." THEREFORE, IT HAD NO JURISDICTION TO REVERSE SUCH A FINDING UNDER RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Judge Oakes in his dissenting opinion stated that the issue of foreseeability was one of fact and that factual issues had been resolved in favor of the petitioner. Judge Oakes further stated that the factual finding of foreseeability was not "clearly erroneous" and, therefore, the United States Court of Appeals had no authority to reverse the judgment in favor of the petitioner.

The following is a portion of the history of the financial difficulties experienced by the dealership and known to the respondent-franchisor, all of which predated January 24, 1979, the date of the Cullen incident:

1. Bavarian (the dealer) in 1978 gave Mr. Matz, a customer, a check for the return of a deposit in the sum of $200 which bounced. This bad check was reported by Matz to BMW/NA on July 24, 1978 (1.44-1.55 Vol. II; E-58 Vol. IV).

2. Bavarian (the dealer) gave Mr. Bloom, a customer, a bad check in the sum of $668 on September 10, 1978 (1.62 Vol. II; E-57 Vol. IV).

3. Bavarian (the dealer) refused to return a deposit to Mr. Schaeffer in the sum of $500 and after two complaints were made to respondent-franchisor, the deposit was finally returned (1.62 Vol. II; E-59 Vol. IV).

4. Mr. Gasser, a customer, gave a deposit to Bavarian of $1,000 for the purchase of a vehicle. The vehicle was not available. Mr. Gasser had to complain to the respondent before the dealer returned his payment (1.62 Vol. II; E-60 Vol. IV).

5. We have four documented complaints involving Matz, Bloom, Schaeffer and Gasser where, in reality, Bavarian attempted to keep monies that didn't belong to it and, in some instances, allegedly paid back the monies with a worthless check.

6. Bavarian and BMW/NA had no franchise agreement in effect in 1979 when the Cullen incident occurred although Bavarian was permitted to operate as a franchised dealer (1.82 Vol. II).

7. It was conceded by counsel for BMW/NA that Bavarian filed only two monthly financial statements from 1975 until the termination of the franchise in 1979. Monthly financial statements were required and, yet, two were filed instead of approximately 48 (1.89 Vol. II; 1.89, 1.90 Vol. II and E-130, E-134 Vol. IV; 1.91 Vol. II).

8. The financial condition of Bavarian was so precarious and the experience of BMW/NA in receiving

worthless checks from Bavarian was so frequent that in 1978 BMW/NA required that Bavarian go on a certified check basis for the payment of parts to be delivered by BMW/NA (1.97 Vol. II).

9. No new vehicles were received by Bavarian from respondent since August of 1978, or six months before the Cullen incident (1.109 Vol. II).

10. Respondent, BMW/NA, became aware that Bavarian passed checks with insufficient funds to other dealerships in 1978 (2.22 Vol. II).

11. Respondent, BMW/NA, permitted Bavarian to participate in promotional advertising in the latter part of 1978 and 1979 when BMW/NA knew that Bavarian was receiving no new cars (2.39 Vol. II).

12. Respondent, BMW/NA, became aware of a judgment recovered by the Israel Discount Bank against Bavarian on October 28, 1977, in the sum of $75,000 (E-63 Vol. IV).

13. The record included a letter from BMW/NA to Bavarian dated December 18, 1978, which recited a long history of financial difficulties of Bavarian, all of which were known to respondent. This letter is annexed hereto as Exhibit "D." Despite this letter, the franchise was continued to February 16, 1979, without an agreement (E-44 Vol. /; 2.46 Vol. II; E-43, 2.53-2.54 Vol. II).

14. In fact, the financial condition of Bavarian was so poor that on August 30, 1978, BMW/NA sent personal representatives to Bavarian to collect payment of obligations (E-25 Vol. IV).

15. Exhibit 27 was an inter-company memo of BMW/NA dated September 1, 1978, marked as Exhibit "E" herewith, which discussed the financial condition of the dealer and indicated that within a sixty-day period the dealership should once again become a viable point in the BMW/NA network. In this connection the memo stated:

> "Should these topics not be reconciled in the specified period, BMW/NA would review the viability and potential longevity of Bavarian Auto Sales in the dealer body" (annexed to this petition is a copy of Exhibit 27).

16. Mr. Trontell of BMW/NA conceded that on August 30, 1978, or about six months before the Cullen incident, he visited Bavarian and in his opinion Bavarian at that time was not a viable franchise (2.61-2.62 Vol. II).

17. On December 15, 1978, or about one month before the Cullen incident, Bavarian passed a bad check to BMW/NA in the sum of $1,200.

18. A memo dated December 19, 1978, established that Mr. Trontell of BMW/NA went to Bavarian to secure the return of nine vehicles, that Bavarian had no floor plan, that Bavarian arranged to borrow two vehicles from Jamaica BMW on December 16, 1978, and that Mr. Trontell of BMW/NA instructed Jamaica BMW not to loan Bavarian any vehicles which were the property of BMW/NA (2.63 Vol. II and E-49-50 Vol. IV, Exhibit 44).

19. During August and September of 1978, Bavarian continued to issue bad checks to BMW/NA which were approximately ten in number and which involved approximately $28,000. This was all within four or five months of

the Cullen incident (Exhibits 29, 30, 31 and 46; E-27, E-30, E-35 and E-52 Vol. IV).

20. MR. TRONTELL OF BMW/NA GAVE AN ESTIMATE THAT BAVARIAN PASSED APPROXIMATELY $40,000 IN BAD CHECKS (2.117 Vol. II).

21. In the letter dated December 18, 1978, Exhibit "D" herein, a communication to Bavarian from BMW/NA, it was recited:

> "As you have been previously informed, your dealership has serious and continuing deficiencies as a result of which you do not meet the minimum standards for a BMW dealership. Accordingly, we are unable * * *"
>
> "* * * to offer you a 1979 dealer agreement" (Exhibit 43).

22. Judge Moore in the majority opinion in the United States Court of Appeals stated:

> "BMW/NA was unaware, however, of any tax levies filed against Bavarian * * *"

23. The Court's finding that BMW/NA was unaware of any tax levies is inaccurate. In fact, BMW/NA ordered a Dun & Bradstreet report on December 19, 1977, on Bavarian and this report disclosed three tax liens of the United States of America against Bavarian in excess of $37,000 (2.160 Vol. II; E-21 Vol. IV). Although this search was disclosed by Dun & Bradstreet at the request of BMW/NA, Mr. Scelsi, the credit manager of BMW/NA,

designated no one to investigate the liens against Bavarian (2.160-161 Vol. II).

24. A prior Dun & Bradstreet report dated October 19, 1977, secured by BMW/NA disclosed that Bavarian had placed all its property as collateral with the Israel Discount Bank (Exhibit 19; 2.161 Vol. II, E-23 Vol. IV).

25. As early as October 28, 1977, Mr. Scelsi of BMW/NA sent an inter-company memo to Mr. Pokorny mentioning that Israel Discount Bank owned all the assets of Bavarian, mentioning that the service manager had resigned and other employees were considering resignation and stating:

> "I really don't like the trend of events taking place at Bavarian and I feel that we should all be watching them very closely" (2.164 Vol. II).

This memo of intensified vigilance was dated October 28, 1977, or approximately 18 months before the Cullen incident.

26. Exhibit 67J in Petitioner's Exhibit Volume I pertained to promotional advertisements by BMW/NA concerning its 3,000 BMW dealerships around the world and this advertising stated in part:

> "As you might imagine, we at Bavarian Motor Works are rather cautious in our choice of dealers."
>
> "So the appointment of a new dealership is a significant event."

REASONS FOR GRANTING REVIEW.

POINT I.

The United States Court of Appeals in reversing the lower Court determination on the issue of foreseeability, violated Rule 52(a) of the Federal Rules of Civil Procedure.

Rule 52(a) of the Federal Rules of Civil Procedure recites that findings of fact made by the trier of the fact shall not be set aside unless clearly erroneous. The majority of the United States Court of Appeals, in reversing the lower Court decision for the petitioner, violated Rule 52(a). The United States Court of Appeals found that the conduct of the franchisee in retaining the $18,000 payment made by Cullen and in failing to give Cullen a new car was not a foreseeable event.

It is submitted that the record before the lower Court demonstrated ample evidence of financial misconduct by the franchisee over a period of many years and that the incident involving Cullen was certainly foreseeable based upon the negligence of the franchisor in monitoring the franchisee and the negligence of the franchisor in permitting the franchisee to continue operations with its incredible background of financial mismanagement.

The doctrine of foreseeability was a question of fact and that question of fact was resolved in favor of the Petitioner in the lower Court. Mr. Justice Oakes in his written dissenting opinion in the United States Court of Appeals stated:

> "Thus I agree with Judge Neaher that the dealer's thievery was foreseeable and that though it

was an intervening act it nevertheless did not absolve BMW/NA of responsibility."

"But, foreseeability is also peculiarly a question of fact. As the New York Court of Appeals said in *Havas,* 49 N.Y.2d at 388, 402 N.E.2d at 1139, 426 N.Y.S.2d at 237, 'it is particularly appropriate to leave this issue' to the finder of fact. *See also* 2 F. Harper & F. James, *The Law of Torts* §18.8, at 1059 (1956) ("Reasonable foreseeability of harm is the very prototype of the question the jury must pass upon in particularizing the standard of conduct in the case before it.") I had supposed that the reason we have Fed. R. Civ. P. 52(a), which tells us that a district court's findings should withstand appellate review unless clearly erroneous, is to give the district court as trier of the fact the same range of determination as we give a jury. Interestingly, only last April the Supreme Court, not very gently, reminded the courts of appeals that Rule 52 "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. In particular, it does not divide findings of fact into ultimate and subsidiary facts." *Pullman-Standard v. Swint,* 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982) (No. 80-1190)."

"Thus because I do not think that the district court's finding of foreseeability was clearly erroneous, I would affirm even if I had some doubt on the foreseeability question. But in light of the applicable New York cases, I do not have even such a doubt."

It is interesting to note that the majority opinion of the United States Court of Appeals erroneously stated in its decision:

> "BMW/NA was unaware, however, of any tax levies filed against Bavarian or the reasons behind the Israel Discount Bank's decision to terminate Bavarian's line of credit."

The Court's finding that BMW/NA was unaware of any tax levies is inaccurate. In fact, BMW/NA ordered a Dun & Bradstreet report on December 19, 1977, on Bavarian and this report disclosed three tax liens to the United States of America against Bavarian in excess of $37,000 (2.160 Vol. II; E-21 Vol. IV). Although this search was disclosed by Dun & Bradstreet at the request of BMW/NA, Mr. Scelsi, the credit manager of BMW/NA, designated no one to investigate the liens against Bavarian (2.160-161 Vol. II).

A prior Dun & Bradstreet report dated October 19, 1977, secured by BMW/NA disclosed that Bavarian had placed all its property as collateral with the Israel Discount Bank (Exhibit 19; 2.161 Vol. II; E-23 Vol. IV).

The majority opinion of the United States Court of Appeals stated, in substance, that the respondent did not control the operation of the dealer. This is not true. The record clearly demonstrated that the respondent controlled the number of vehicles to be allocated to the dealer, the required amount of capitalization, the filing of financial statements, promotional advertising, the requirement that the dealer pay for parts by certified check, acceptable floor plan, makeup of invoices and other documents, the form of and the manner in which the BMW logo was to be used and the term of the franchise agreement.

POINT II.

The decision of the United States Court of Appeals in reversing the lower Court finding of foreseeability was such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The majority decision of the United States Court of Appeals, in effect, reversed the lower court's findings of fact on the issue of foreseeability. This departure from the accepted and usual course of judicial proceedings not only violated Rule 52-a of the Federal Rules of Civil Procedure but also was in violation of Rule 17-1(a) of the Rules of the Supreme Court of the United States. The United States Court of Appeals, by its decision, ignored the decision of the United States Supreme Court in *Pullman-Standard v. Swint,* No. 80-1190, 50 U.S.L.W., 4425-4429.

POINT III.

The decision of the United States Court of Appeals was in direct violation of the ruling of the United States Supreme Court on April 27, 1982 in *Pullman-Standard v. Swint,* No. 80-1190, 50 U.S.L.W., 4425-4429.

In the *Pullman* case the Supreme Court of the United States granted certiorari and stated in its opinion reversing the United States Court of Appeals:

> "We granted the petitions for certiorari filed by the USW and by the Company, —U.S.—, limited to the first question presented in each petition: whether a Court of Appeals is bound by the 'clearly

> erroneous' rule of Fed. Rules Civ. Proc. 52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the bona fides of the seniority system. We conclude that the Court of Appeals erred in the course of its review and accordingly reverse its judgment and remand for further proceedings."

Judge White further stated in reversing the United States Court of Appeals because it violated Rule 52(a) of the Federal Rules of Civil Procedure as follows:

> "In reaching this conclusion, the Court of Appeals did not purport to be correcting a legal error, nor did it refer to or expressly apply the clearly erroneous standard."

The Supreme Court went on to further state at page 4429:

> "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts.
>
> The rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in

> saying that if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination. It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52's clearly erroneous standard. It is not a question of law and not a mixed question of law and fact."

In the instant case, the United States Court of Appeals made no mention in the majority opinion that it was reversing upon the ground that the finding of foreseeability was clearly erroneous. This was a factual finding supported by the evidence that, on its face, was not "clearly erroneous."

POINT IV.

The novelty of the lower Court decision was an unmentioned influencing factor in the reversal of the lower Court by the United States Court of Appeals.

The issue decided by Judge Neaher in the United States District Court was a case of first impression in the United States. Counsel for petitioner knows of no decision imposing financial responsibility upon a franchisor or automobile manufacturer for the financial default of a franchisee or dealer where the manufacturer or franchisor is negligent in the financial monitoring of the franchisee or

dealer. The United States Court of Appeals in reversing Judge Neaher made no mention that his finding of "foreseeability" was clearly erroneous. An affirmance by the United States Court of Appeals of the decision of Judge Neaher would open up a new area of responsibility in the United States by the automobile manufacturer and/or franchisor to the general public. This Court would have jurisdiction under the commerce clause of the Constitution to set forth a theory of legal responsibility by manufacturers and franchisors to the general public for the financial default of the dealer and/or franchisee when negligent in the supervision thereof.

Conclusion.

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit upon the following grounds:

1. The decision of the United States Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure by overruling a finding of foreseeability which was not "clearly erroneous" based upon the evidence sustained in the lower court.

2. That the decision of the United States Court of Appeals violated Rule 17 of the Rules of the Supreme Court of the United States in that the decision of the United States Court of Appeals was a departure from the accepted and usual course of judicial proceedings.

3. That the decision of the United States Court of Appeals was directly contrary to the recent holding of the United States Supreme Court in *Pullman-Standard v. Swint,* decided April 27, 1982, 80-1190, 50 U.S.L.W.,

4425-4429, which held that the Court of Appeals under Rule 52(a) cannot reverse and set aside findings of fact unless "clearly erroneous."

4. The issue before this Court involves an important question of Federal Law. This is a case of first impression in the United States. Under the Commerce Clause of the Constitution, this Court would have jurisdiction.

Respectfully submitted,

LOUIS J. CASTELLANO, JR., P.C.
Attorney for Petitioner
Thomas W. Cullen, Jr.

APPENDIX A.

Decision and Order of United States Court of Appeals, Dated October 13, 1982.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 1141 August Term, 1982
Argued May 27, 1982 Decided October 13, 1982
Docket No. 82-7118

THOMAS W. CULLEN, Jr.,

Plaintiff-Appellee,

against

BMW OF NORTH AMERICA, Inc.,

Defendant-Appellant.

Before:

LUMBARD, MOORE, OAKES, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Honorable Edward R. Neaher, Judge, in favor of plaintiff-appellee

Thomas W. Cullen, Jr., in the amount of $18,000 plus interest, and from a judgment denying defendant's motion to amend the judgment.

Reversed.

Louis J. Castellano, Jr., Garden City, New Jersey, for Plaintiff-Appellee.

Kevin P. Hughes, New York, New York (Weil, Gotshal & Manges, Salem M. Katsh, Yvette Miller, Richard S. Taffet, Jonathan M. Hoff, of counsel), for Defendant-Appellant.

Rivkin Sherman and Levy, Washington, D.C. (Milton D. Andrews, Esq. and Lance E. Tunick, Esq., of counsel) for *Amicus Curiae,* Automobile Importers of America, Inc.

MOORE, *Circuit Judge:*

Defendant BMW of North America, Inc. ("BMW/NA") appeals from a judgment of the United States District Court for the Eastern District of New York, Honorable Edward R. Neaher, Judge, in favor of Thomas W. Cullen, Jr., in the amount of $18,000 plus interest, and from a judgment of that same court, denying defendant's motion to amend the judgment. BMW/NA is the exclusive importer and distributor in the United States of passenger cars, parts, and products manufactured by Bayerische Motoren Werke, AG. On appeal, BMW/NA claims that the district court erred in finding that it had breached a duty under New York law actively to police the methods of operation of its franchisee, Bavarian Auto Sales, Inc. ("Bavarian"), and had negligently permitted Bavarian to continue as a BMW dealer. We agree with BMW/NA that it did not owe a duty to supervise the operation of Bavarian and to terminate the franchise because of its allegedly precarious financial condition. Accordingly, we reverse the judgments of the district court.

FACTS

On January 24, 1979, Thomas W. Cullen, Jr., and his wife drove past the showroom of Bavarian and decided to shop for a car. Cullen selected a new 1978 BMW, Model 530i, at a price of $18,245, and placed a deposit of $245 on the vehicle. Although Cullen had originally been told that the car would not be available for seven to ten days, a Bavarian salesman called Cullen five days later, advising that the car had arrived and requesting a check for the balance of the purchase price. Cullen promptly remitted a check in the amount of $18,000, which was cashed by Bavarian. However, Cullen never received the automobile or the return of his money. In fact, Hans Eichler, Bavarian's president and owner of a 60 percent interest in the franchise, had stolen and absconded with Cullen's money. At no time relevant to the transaction, however, did Cullen have any contact, in person, by telephone, or by mail, with any representative of BMW/NA.

Cullen subsequently commenced a civil suit against Bavarian in New York State Supreme Court, Nassau County. The suit was stayed after Eichler filed a petition in bankruptcy. Cullen also filed criminal complaints with the Queens County District Attorney and the Attorney General of the State of New York, but no indictments were issued.[1] In addition, Cullen brought this action based on diversity grounds against BMW/NA.

Bavarian was operating as a franchised BMW dealer, with Eichler as its principal, when BMW/NA assumed control over the distribution of BMW automobiles in March, 1975. It continued to operate as a franchised BMW dealer until February 16, 1979 when the dealership ended.[2]

Pursuant to a standard operating agreement with BMW/NA, Bavarian was responsible for maintaining a

prearranged line of credit with a financial institution to be used exclusively for the purchase of BMW vehicles. Bavarian, however, permitted its line of credit to lapse. Prior to August, 1976, Bavarian had a line of credit with the State Bank of Long Island. On August 18, 1976, however, the bank informed BMW/NA that it had terminated its relationship with Bavarian because Eichler had advised the bank that he had arranged to handle Bavarian's credit requirements from personal resources. BMW/NA experienced difficulty, however, in receiving payment for cars and parts and placed Bavarian on a C.O.D. certified check basis, rather than open account status, in the latter part of 1976.

In June, 1977, BMW/NA received a letter from the Israel Discount Bank stating that effective June 16, 1977, Bavarian had established a line of credit for $200,000. From the latter part of 1976 through August 22, 1977, the Israel Discount Bank had paid for approximately eighty-seven vehicles purchased by Bavarian even though no formal letter of credit was in effect for most of this period. The bank also paid BMW/NA for another twenty-six vehicles between September 30, 1977 and December 27, 1977. The Israel Discount Bank continued as Bavarian's credit facility through the summer of 1978. The bank paid BMW/NA for fifty-three automobiles between January 1, 1978 and August 18, 1978. In the fall of 1978, however, the bank concluded that the dealership was experiencing financial difficulty and decided not to extend further credit. The bank's decision was in part based upon certain tax levies and other legal actions filed against the Bavarian franchise. BMW/NA was unaware, however, of any tax levies filed against Bavarian or the reasons behind the Israel Discount Bank's decision to terminate Bavarian's line of credit.

At approximately the time at which Bavarian lost its line of credit, BMW/NA began receiving an inceased number of customer complaints concerning the Bavarian franchise. These complaints ranged from the issuance of checks on accounts with insufficient funds to alleged delays in return of customer deposits. Although an investigaton by BMW/NA revealed that all complaints had been satisfactorily resolved and all checks were covered on re-presentation, BMW/NA remained disturbed by Bavarian's continued failure to satisfy certain requirements of its contract with BMW/NA, such as submitting monthly financial statements,[3] and the increased number of checks which Bavarian had issued on accounts with insufficient funds.[4]

Eichler attempted to reassure BMW/NA of Bavarian's financial viability, indicating that he was actively negotiating with a variety of financial institutions to obtain a line of credit. By mid-September, however, Bavarian still had not been able to secure credit funds, and BMW/NA met with Eicher to discuss the future of the franchise. After reviewing the dealership's file, BMW/NA concluded that it would be difficult to terminate the Bavarian franchise at that time, without adquate written documentation certifying the dealer's deficiencies and without providing Bavarian an opportunity to correct those deficiencies. Accordingly, BMW/NA granted Bavarian sixty days to cure all deficiencies, and BMW/NA personnel closely monitored the franchise during this period. BMW/NA continued to operate as a BMW dealer and service facility and maintained the minimum number of vehicles required by its contract with BMW/NA.

At Bavarian's request, the original sixty-day period was extended until November 14, 1978. On the following day, Eichler informed BMW/NA that he had verbal approval

from Citibank for credit and that he was awaiting confirmation. Although the Citibank commitment did not materialize, the Lloyd Capital Corporation ("Lloyd") advised BMW/NA, by letter dated December 7, 1978, that Bavarian had established a line of credit for $400,000 exclusively for BMW automobiles. Lloyd informed BMW/NA that the letter of credit had been withdrawn.[5] The seven vehicles were then removed from Bavarian and were reallocated to a nearby BMW dealer. Moreover, Friedrich Hanau, vice-president of BMW/NA, immediately wrote to Eichler, setting forth the company's position that unless Bavarian corrected its continuing deficiencies within an additional sixty days, BMW/NA would serve a notice of intent to terminate the franchise. Eichler responded on December 28, 1978, indicating that he was accelerating his efforts to obtain a line of credit, and expressing his desire to continue as a BMW dealer. In early January, 1979, however, Eichler advised BMW/NA that he desired to sell his franchise to another automobile dealer. This prospective purchaser submitted an application which BMW/NA, in early February, rejected for failing to satisfy BMW/NA's established standards for a new dealership.

On February 13, 1979, BMW/NA officials again met with Eichler to discuss the future of the franchise. At this meeting, BMW/NA officials learned that Eichler had accepted deposits from customers totalling approximately $100,000 and that he had used this money for his own purposes. Three days later, BMW/NA accepted Eichler's voluntary letter of resignation.

DISCUSSION

Cullen alleged at trial two theories of liability: (1) that Bavarian acted as BMW/NA's agent pursuant to principles of either actual agency or agency by estoppel; and

(2) that BMW/NA negligently permitted Bavarian to continue as a BMW dealer because it had knowledge of Bavarian's precarious financial condition.[6] The district court rejected the first theory of liability, finding that Cullen failed to prove the essential elements supporting a theory of agency by estoppel.[7] The court held, however, that BMW/NA was liable for damages under the negligence theory, finding that Cullen had met his "burden of proving facts which give rise to a legal duty on the part of BMW/NA, for the protection of its franchisee's customers, to reasonably police the authorized use of the BMW name and supervise the operation of its franchise." *Cullen v. BMW of North America, Inc.*, No. 79 C 970, slip op. at 12 (E.D.N.Y. Oct. 28, 1981). In imposing a duty on BMW/NA, the district court found that BMW/NA "was apprised of Bavarian's propensity for unscrupulous business transactions," *Cullen v. BMW of North America, Inc.*, No. 79 C 970, slip op. at 25 (E.D.N.Y. Jan. 29, 1982), and that as a result, "BMW/NA should have reasonably foreseen that Bavarian might have intentionally caused some financial harm to some BMW customer as a result of its original negligence . . . ." *Id.* The court thus concluded that where a franchisor, such as BMW/NA, has a "reasonable opportunity to reduce the risk of foreseeable injury" caused by its franchisee, *id.*, but fails to terminate its franchisee or take other appropriate action, the franchisor is negligent and is liable for damages suffered by the ultimate consumer.

We conclude, however, that the district court improperly determined that Cullen's injury was reasonably foreseeable, and thus erred in finding BMW/NA liable for negligent failure to police the methods of operation of its independent franchisee and to terminate the franchise because of Bavarian's precarious financial condition.

"The law does not undertake to hold a person who is chargeable with a breach of duty toward another, with all the possible consequences of his wrongful act." *Lowery v. Western Union Telegraph Co.*, 60 N.Y. 198, 201 (1875). It is thus a well-established principle that foreseeablity of injury is an indispensable requisite of negligence, and that negligence exists only when there is a reasonable likelihood of danger as the result of the act complained of. *Ward v. State of New York*, 81 Misc.2d 583, 366 N.Y.S.2d 800 (N.Y. Ct. Cl. 1975). Accordingly, an intervening act, tortious or criminal, will ordinarily insulate a negligent defendant from liability when the subsequent act could not have been reasonably anticipted by the defendant. *Tirado v. Lubarsky*, 49 Misc.2d 543, 268 N.Y.S.2d 54 (N.Y. Civ. Ct.), *aff'd*, 52 Misc.2d 527, 276 N.Y.S.2d 128 (N.Y. App. Div. 1966).

Applying these principles to the instant action, we decline to hold BMW/NA negligent and liable for damages since it could not reasonably have anticipated the crimes committed by Bavarian's principal, Eichler. Although BMW/NA may have been aware of Bavarian's shaky financial condition, that knowledge alone gave BMW/NA no cause reasonably to anticipate that Eichler would either engage in any criminal activity or that he would abscond with customer funds. In fact, no amount of supervision by BMW/NA would have enabled it to foresee Eichler's thievery. Moreover, even though BMW/NA had notice that Bavarian had been the subject of customer complaints, most complaints were resolved, and the record does not demonstrate that there was any dishonesty or criminal intent associated with these incidents. Furthermore, we note that the district court's finding that Bavarian was an independently owned and operated dealership is sufficient to eliminate any question

of control by BMW/NA. BMW/NA had no financial interest in Bavarian, did not participate in the hiring or firing of its officers or employees, or dictate its sales practices. Accordingly, we conclude that BMW/NA, even though it had knowledge of Bavarian's precarious financial condition, was not liable to Cullen for his damages under a negligence theory since it could not have reasonably foreseen Eichler's criminal activity.

Reversed.

OAKES, *Circuit Judge* (dissenting):

I dissent because I believe, as did the trial judge, that the injury suffered by Cullen was foreseeable; I also believe that the majority fails to give the experienced trial judge's finding to that effect the deference to which it is entitled.

In this diversity case we are of course required to turn to New York law, and one cannot discuss the questions of duty and foreseeability without reference to *Palsgraf v. Long Island Railroad,* 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928), where Cardozo stated that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *See also MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916) ("foresight of the consequences involves the creation of a duty"). Although the New York Court of Appeals was to say in *Pulka v. Edelman,* 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976) (parking garage not liable for pedestrian injury caused by exiting car), that "[f]oreseeability should not be confused with duty," four years later it stated in *Havas v. Victory Stock Paper Co.,* 49 N.Y.2d 381, 402 N.E.2d 1136, 426 N.Y.S.2d 233 (1980) (independent trucker's employee

could recover for injuries sustained while helping defendant's employee load waste paper onto truck), that "whether [the defendant] owed a duty to the plaintiff and, if it did, whether, in the face of it, [the defendant] failed to act in a reasonably prudent manner—turn largely on foreseeability." 49 N.Y.2d at 385, 402 N.E.2d at 1138, 426 N.Y.S.2d at 236. *Palsgraf*, quoted immediately thereafter by the *Havas* court, lives.

The majority opinion concludes that BMW of North America, Inc., should not be held liable for its dealer's defalcation of Cullen's money because that defalcation was "an intervening act, tortious or criminal." In other words, "no amount of supervision by BMW/NA would have enabled it to foresee [the dealer's] thievery." But New York law provides, as the common law of England before it provided, that "the criminal conduct of a third person [does] not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard." *Nallan v. Helmsley-Spear, Inc.*, 50 N. Y. 2d 507, 520-21, 407 N. E. 2d 451, 459, 429 N. Y. S. 2d 606, 614 (1980); *Scott v. Shepherd*, 96 Eng. Rep. 525, 526 (C.P. 1773) ("The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages.").

BMW/NA sells its vehicles to the public only through dealerships. It was well aware of this dealer's habit of passing worthless checks and its inability to obtain regular financing through established commercial channels. BMW/NA protected itself by demanding and receiving only certified checks for any goods ordered by its dealer. But consumers were left to fend for themselves, while the BMW/NA dealer, armed with all the indicia of an ongoing BMW dealer from order pads to location, sign, vehicles, and parts, continued to solicit orders and accept deposits

from customers. The dealer's "thievery" was sufficiently foreseeable to BMW/NA that *it* insisted upon certified checks before delivery. Why was such thievery not equally foreseeable insofar as BMW customers were concerned?

Moreover, as the New York Court of Appeals has so cogently indicated, liability concepts have broadened to reflect economic, social, and political developments. *See, e.g., Micallef v. Miehle Co.*, 39 N. Y. 2d 376, 385, 348 N. E. 2d 571, 577, 384 N. Y. S. 2d 115, 121 (1976); *Codling v. Paglia*, 32 N. Y. 2d 330, 340, 298 N. E. 2d 622, 627, 345 N. Y. S. 2d 461, 467-68 (1973). Allowing a defendant to shield itself from liability by conducting operations exclusively through "independent" franchisees ignores the clear "trend of the law . . . to expand the liability of an enterprise to . . . third persons injured because of activities carried on in behalf of the enterprise." Hetherington, *Trends in Enterprise Liability: Law and the Unauthorized Agent*, 19 Stan. L. Rev. 76, 76 (1966). *See also* Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 Yale L. J. 1, 76-77 (1980). Moreover, BMW/NA was in a much better position than was Cullen to determine the financial bona fides of the dealer; indeed, the only real evidence the consumer has of an automobile dealer's financial integrity is the imprimatur given the dealer by the automobile company itself—logos, trademarks, advertising layouts, cars (though here the dealer bought cars from other dealers), and parts, and, most important of all, the continuation of the dealership. Automobile company advertising customarily emphasizes the service, reliability, and intergrity of the company's dealers. Liability here can also fairly be defended as involving a measure of risk-spreading, it seemingly being fairer to saddle the franchisor with the "cost" of distribution involved in an occasional dealer's failure than to saddle the unfortunate consumer who relied upon the very existence of the franchise to put down his good money.

Thus I agree with Judge Neaher that the dealer's thievery was foreseeable and that though it was an intervening act it nevertheless did not absolve BMW/NA of responsibility; in *Scott v. Shepherd* terms, the very existence of the dealership was a squib in a crowded market.

But foreseeability is also peculiarly a question of fact. As the New York Court of Appeals said in *Havas*, 49 N. Y. 2d at 388, 402 N. E. 2d at 1139, 426 N. Y. S. 2d at 237, "[i]t [is] particularly appropriate to leave this issue" to the finder of fact. *See also* 2 F. Harper & F. James, *The Law of Torts* §18.8, at 1059 (1956) ("Reasonable foreseeability of harm is the very prototype of the question the jury must pass upon in particularizing the standard of conduct in the case before it."). I had supposed that the reason we have Fed. R. Civ. P. 52(a), which tells us that a district court's findings should withstand appellate review unless clearly erroneous, is to give the district court as trier of fact the same range of determination as we give a jury. Interestingly, only last April the Supreme Court not very gently reminded the courts of appeals that Rule 52 "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. . . . [I]n particular, it does not divide findings of fact into . . . 'ultimate' and . . . 'subsidiary' facts." *Pullman-Standard v. Swint*, 50 U.S.L.W. 4425, 4429 (U. S. Apr. 27, 1982) (No. 80-1190). Thus because I do not think that the district court's finding of foreseeability was clearly erroneous, I would affirm even if I had some doubt on the foreseeability question. But in light of the applicable New York cases, I do not have even such a doubt.

And if the entire issue were restated in terms of duty rather than in terms of foreseeability, as the New York Court of Appeals in *Pulka v. Edelman, supra*, suggested may be a separate and distinct question (*sed quaere*), I

would refer only to *Hendrickson v. Hodkin,* 276 N. Y. 252, 11 N. E. 2d 899 (1937) (holding a hospital liable for permitting a quack doctor to treat a patient on its premises); *De Ryss v. New York Central Railroad Co.,* 275 N. Y. 85, 9 N. E. 2d 788 (1937) (landowner who permits a third person to hunt under circumstances indicating to a reasonably prudent man that it is dangerous to do so is liable to others injured as a result); and Note, *Liability of a Franchisor for Acts of the Franchisee,* 41 S. Cal. L. Rev. 143 (1968). Here BMW/NA clearly could have terminated the dealership and indeed had a duty to do so in light of the dealer's instability and unscrupulousness, before the dealer took Cullen's deposit.[1]

FOOTNOTES

[1] Eichler and Bavarian were indicted, however, for three counts of grand larceny in the second degree based on Eichler's conduct toward customers other than Cullen. On February 5, 1981, Eichler pleaded guilty to attempted grand larceny in the second degree.

[2] Bavarian and BMW/NA entered into three written franchise agreements from June, 1976 to February 16, 1979: (1) from June 1 to December 31, 1976; (2) from August 12 to December 31, 1977; and (3) from January 1 to December 31, 1978. Although no written agreement was in effect from January 1 to August 12, 1977 or from January 1 to February 16, 1979, Bavarian continued to operate as a duly franchised BMW dealer during these periods.

[3] Bavarian furnished only two monthly financial statements during the several years it operated.

[4] During 1978, checks totalling $40,000 were issued by Bavarian to BMW/NA upon accounts with insufficient funds.

[5] Bavarian had never signed a formal agreement with Lloyd and have never paid Lloyd the $1,000 required by law to be submitted prior to the execution of the agreement.

[6] Cullen's amended complaint alleged four separate theories of liability: (1) that Bavarian was acting as agent for BMW/NA pursuant to principles of either actual agency or agency by estoppel; (2) that BMW/NA was negligent in permitting Bavarian to continue as a dealer because it had knowledge of Bavarian's allegedly precarious financial condition; (3) that BMW/NA entered into a conspiracy with Eichler, and in fact did, defraud customers into doing business with Eichler; and (4) that BMW/NA's conduct constituted a prima facie tort. At the conclusion of discovery, BMW/NA moved for summary judgment dismissing each of Cullen's claims for relief. The district court concluded that an actual agency relationship did not exist between BMW/NA and Bavarian. It also found no evidence to support Cullen's causes of action for conspiracy to commit fraud and prima facie tort, and dismissed those claims as well. Accordingly, only the issues of negligence and agency by estoppel remained to be tried.

[7] The court specifically pointed to Cullen's failure "to prove his reliance on Bavarian's *authority to act* for BMW/NA." *Cullen v. BMW of North America, Inc.*, No. 79 C 970, slip op. at 8 (E.D.N.Y. Oct. 28, 1981) (emphasis in original). Cullen's cross-appeal from the dismissal of this claim for relief was withdrawn pursuant to a stipulation dated March 11, 1982 and filed on March 26, 1982. Accordingly, we need not address this issue on appeal.

Cullen v. BMW of North America 82-7118
I concur.

J. E. L.
9/2/82

Cullen v. BMW of North America, Inc.—Docket No. 82-7118
James L. Oaks dissents with opinion.

Oct. 5, 1982

'I would agree with the district court that there would be no violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976), by termination in this case. *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F. 2d 52 (4th Cir. 1974), *cert. denied*, 420 U. S. 992 (1975). It may not be amiss to say that I am extremely confident that the author of the majority opinion would not disagree with this conclusion either. *See Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F. 2d 425 (2d Cir.), *cert. denied*, 371 U. S. 829 (1962).

APPENDIX B.

Order of United States Court of Appeals, Dated December 6, 1982.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of December, one thousand nine hundred and eighty-two.

THOMAS W. CULLEN, Jr.,

Plaintiff-Appellee,

v.

BMW OF NORTH AMERICA, Inc.,

Defendant-Appellant.

No. 82-7118

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Thomas W. Cullen, Jr.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Oakes dissenting.

It is further noted that the suggestion for hearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk
by: FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX C.

Decision and Order of Neaher, U. S. D. J., Dated January 29, 1982.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

THOMAS W. CULLEN, Jr.,

Plaintiff,

against

BMW OF NORTH AMERICA, Inc.,

Defendant.

No. 79 C 970

Appearances:

Louis J. Castellano, Jr., Esq., Garden City, New York, Attorney for Plaintiff.

Weil, Gotshal & Manges, New York, N.Y., Attorneys for Defendant. By Kevin P. Hughes, Esq., Yvette Miller, Esq., Joseph Allerhand, Esq.

NEAHER, District Judge.

Following the Court's memorandum of decision and order dated October 28, 1981, defendant timely sought amendment of the judgment. Rules 52(b) and 59(e), F.R.Civ.P. The application has been considered, but after careful study of defendant's arguments in support of its motion, the Court adheres to its decision, revising the opinion as follows to reflect the additional authority which it believes supports the original decision.

Plaintiff, Thomas W. Cullen, Jr., seeks to recover $18,000 with interest, plus punitive damages, paid to Bavarian Auto Sales, Inc. (Bavarian), a BMW dealer formerly franchised by defendant, BMW of North America, Inc. (BMW/NA). BMW/NA is "the exclusive importer and distributor in the United States of passenger cars, parts and products manufactured by Bayerische Motoren Werks, AG." Plaintiff's Exhibit 93. A Delaware corporation, BMW/NA has its principal place of business at Montvale, New Jersey. This diversity action is now before the Court subsequent to partial summary judgment in favor of defendant and trial without a jury on the remaining issues.[1]

The facts established at trial follow. On January 24, 1979 Cullen entered into a sales contract with Bavarian for a new 1978 BMW, Model 530i, at a price of $18,245. Having paid a deposit of $245, Collen received a call five days later from the salesman advising that the car had arrived and requesting a check for the balance of the purchase price. Plaintiff remitted a check for $18,000, which was cashed by Bavarian, but never received the car or the return of his money.

Cullen commenced a civil action against Bavarian in New York State Supreme Court, Nassau County, which was stayed when Bavarian's president, Hans Eichler, filed a petition in bankruptcy. Cullen also filed criminal complaints with the Queens County District Attorney and the

Attorney General of the State of New York, although no indictments were issued.[2] This action was subsequently commenced.

Bavarian operated continuously as an authorized BMW dealer from at least June of 1976 to February 16, 1979, on which date Eichler voluntarily terminated all agreements between Bavarian and BMW/NA. Three written franchise agreements were entered into during this time: (1) from June 1 to December 31, 1976; (2) from August 12 to December 31, 1977; and (3) from January 1 to December 31, 1978. Although no written agreement was in effect from January 1 to August 12, 1977 or from January 1 to February 16, 1979, Bavarian continued to operate as a duly franchised BMW dealer during these periods. In fact, recognizing the continuation of dealerships without formal agreement is not an unusual practice for BMW/NA. Trial Transcript at 2.125-26.

From the beginning of Bavarian's relationship with BMW/NA, the latter received indications of Bavarian's financial instability. For example, difficulty in receiving payment for cars and parts prompted BMW/NA to place Bavarian on a C.O.D. certified check basis, rather than open account status, in the latter part of 1976. Additionally, despite Bavarian's contractual obligations and BMW/NA's repeated requests, Bavarian furnished only two monthly financial statements during the several years it operated. Further, from 1976 onward, Bavarian demonstrated persistent difficulty in maintaining minimum credit lines essential to standard operation of BMW dealerships. Finally, throughout the operation of the franchise Bavarian repeatedly failed to maintain sufficient funds to enable legitimate issuance of checks to BMW/NA, other BMW dealers, and customers.

During the latter part of 1978, Bavarian's instability escalated, and BMW/NA received intensified indications

of its financial irregularities and irresponsibility. For example, from July to September 1978, BMW/NA received five customer complaints against Bavarian, each of which alleged Bavarian had taken partial payment for a car but had neither delivered the vehicle nor refunded the payment. In some of these cases, Bavarian had issued checks on insufficient funds to refund deposits made by the customers. Further, during 1978, checks aggregating some $40,000 were issued by Bavarian to BMW/NA upon accounts with insufficient funds.

On October 30, 1978, BMW/NA extended an initial sixty-day period granted Bavarian to re-establish its financial viability. This period was extended to November 14, 1978, but Bavarian still failed to remedy its deficiencies by that date.

On November 15, 1978, Bavarian represented to BMW/NA that approval of funds from the Small Business Administration and Citibank was imminent, but no such approval ensued. On December 7, 1978, BMW/NA received notice from Lloyd Capital Corporation that Bavarian had established a line of credit, but a week later BMW/NA learned that Eichler had misrepresented his intention to follow through with the credit application process, had never signed a formal agreement with Lloyd, and had never paid Lloyd the $1000 required by law to be submitted prior to execution of the agreement.

In a letter dated December 18, 1978, BMW/NA notified Eichler that because of "serious and continuing deficiencies" in the dealership, BMW/NA would not offer him a 1979 dealer agreement. The deficiencies outlined in the letter were: (1) failure to observe minimum wholesale credit requirement; (2) impairment of financial reputation, including issuance of checks, later dishonored, to other BMW dealers; (3) parts accounts arrearages, including issuance of checks, later dishonored, to BMW/NA; (4)

failure to observe parts inventory requirements; and (5) failure to submit year-end and monthly financial and operating statements.

Although Eichler responded to the above letter on December 29, 1978, expressing his desire to continue the dealership, BMW/NA did not reply to confirm either termination or extension of the franchise. The next contact evidences BMW/NA's recognition of the continued operation of the Bavarian franchise: it refused to authorize Eichler's proposed sale of Bavarian to an existing dealer. Had BMW/NA asserted its rights under the dealer agreement, which had expired by its own terms on December 31, 1978, it could have insisted that Bavarian remove at its own expense all BMW signs displayed publicly, refrain from using BMW trademarks, destroy all printed material bearing BMW trademarks, and cease to hold itself out as an authorized BMW dealer. Plaintiff's Exhibit 103. Further, BMW/NA could have required Bavarian to sell and deliver to BMW/NA all new BMW vehicles, parts and tools purchased by Bavarian from BMW/NA. Instead, BMW/NA allowed Eichler to continue holding out Bavarian as an authorized dealership, as evidenced by the BMW logo publicly displayed on the outside of the showroom and the use of printed materials bearing BMW trademarks.

It should be noted that August 1978 was the last time BMW/NA received payment for any cars allocated to Bavarian. Further, in December 1978 BMW/NA removed all cars it had delivered to Bavarian for failure to maintain a minimum credit structure. Yet, during January and February of 1979, the showroom contained several new BMW vehicles borrowed from other dealers, thus giving Bavarian the appearance of a viable ongoing business.

On February 13, 1979, a meeting was held to discuss the future of Bavarian. This meeting was approximately two

weeks after Cullen had been denied delivery of the car, and although Cullen had not contacted BMW/NA, at the meeting BMW/NA was apprised of information that Eichler had accepted deposits from seven customers totalling $100,000 and had used the money for other purposes. Still, BMW/NA made no definitive response, and three days later Eichler voluntarily resigned the franchise. Only at that point did BMW/NA pursue its rights subsequent to termination outlined above.

The record is clear that Bavarian was an independently owned and operated dealership, but plaintiff seeks to hold BMW/NA liable under the doctrine of agency by estoppel. This theory must fall for lack of proof of its essential elements. It is well settled that agency by estoppel arises only when the party charged as principal intentionally or carelessly causes the belief that the putative agent is authorized to bind that party. *Karavos Compania Naviera S.A v. Atlantica Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978); Restatement of Agency 2d §8B; 2 N.Y.Jur., Agency §§25, 87. Moreover, under New York law,

> "apparent or ostensible authority, or agency by estoppel is created only by acts or neglects of the person sought to be charged as principal, and the person dealing with the ostensible agent must have known of and relied upon such acts or omissions, and such reliance must be in good faith and in the exercise of reasonble prudence." *Perry v. New York Life Ins. Co.*, 22 N.Y.S.2d 696, 701-02 (Sup. Ct. 1940).

Although plaintiff offered into evidence various public manifestations of a relationship between Bavarian and BMW/NA, he failed to prove his reliance on Bavarian's *authority to act* for BMW/NA. Similarly, there is no

evidence of Cullen's belief that the transaction was entered into by or for BMW/NA. On the contrary, plaintiff's own testimony shows there was an absence of reliance on advertisements, on the similarity between the corporate names of Bavarian and BMW/NA (Bavarian Motor Works), or on the BMW logo appearing on the sales slip.

Plaintiff did testify as to his reliance on the BMW logo appearing on the outside of Bavarian's premises, but the question remains to what his reliance was directed. The testimony shows not a belief that Bavarian had authority to act for BMW/NA, but that the BMW logo represented a particular quality of cars sold at Bavarian. Since this testimony indicates, at most, Cullen's reliance on Bavarian's authority to sell BMW automobiles, plaintiff failed to carry its burden of proving the belief essential to agency by estoppel.

Turning to plaintiff's negligence theory, the evidence adduced at trial shows that BMW/NA unreasonably permitted Bavarian to continue holding itself out to the public as an authorized BMW dealer, and to purport to sell Cullen a car, during a period in which defendant had ample knowledge of Bavarian's precarious financial condition and history of questionable business practices. Yet, proving the unreasonableness of defendant's conduct does not establish actionable negligence. To accomplish the latter plaintiff must first sustain his burden of proving the breach of a legal duty owing by defendant to plaintiff, a violation of plaintiff's rights. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Defendant argues that BMW/NA owed Cullen no duty to enforce the provisions of its agreement with Bavarian, based on plaintiff's inability to claim as a third-party beneficiary under that contract. The argument is correct as far as it goes, for it is true that the parties to the agreement, in establishing their distributer/dealer relationship,

expressed no intent to confer a direct benefit on ultimate consumers. In the absence of such expression, plaintiff assumes the status of an incidental beneficiary, unable to enforce contractual rights or recover for failure to perform contractual duties. *Bernal v. Pinkerton's, Inc.*, 52 App. Div. 2d 760, 382 N.Y.S.2d 769 (1st Dept. 1976), *aff'd*, 41 N.Y.2d 938, 363 N.E.2d 362, 394 N.Y.S.2d 638 (1977); *Beck v. FMC Corp.*, 53 App. Div. 2d 118, 385 N.Y.S.2d 956 (4th Dept. 1976), *aff'd*, 42 N.Y.2d 1027, 369 N.E.2d 10, 398 N.Y.S.2d 1011 (1977).

Nevertheless, the question remains whether BMW/NA owes the ultimate consumer a duty beyond its contractual obligations. Because neither the State judiciary nor legislature has addressed this precise question, the requirement that this Court, sitting in diversity, apply the substantive law of New York, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), leads to a perplexing problem. However, both the Supreme Court and the Second Circuit have provided guidance for federal courts faced with the absence of applicable State law.

In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), the majority of the Court held that the issues presented regarding a contractual arbitration provision concerned a matter of substantive law; therefore, *Erie* mandated application of State law to the agreement. Justice Frankfurter, concurring in the result, commented on the *Erie* doctrine as follows:

> "One of the difficulties, of course, resulting from *Erie R. Co. v. Tompkins*, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created

> rights and state policies going to the heart of those rights. . . As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law."

Id. at 208-09 (Frankfurter, J., concurring) (footnote omitted). See also *King v. Order of Travelers,* 333 U.S. 153, 160-61 (1948).

Similarly, in *Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967), the majority of the Court held that where no decision by a State's highest court exists with respect to characterization of a property interest for purposes of estate tax liability, federal courts must apply "what they find to be the state law":

> "This is but an application of the rule of *Eric R. Co. v. Tompkins, supra,* where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956)." *Id.* at 465.

In the Second Circuit, the Court of Appeals has expressed its "established position" as follows:

> "[W]hen a federal court must determine state law, it should not slavishly follow lower or even upper court decisions but ought to consider all the data the highest court of the state would use. See Corbin, The Laws of the Several States, 50 Yale L.J. 762 (1941). Such is the established position of this court."

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 851 (2d Cir. 1967) (on petition for rehearing) (*per curiam*).

More recently, the Court of Appeals has reaffirmed the principle explained in *Roginsky:*

> "When there is an absence of state authority on an issue presented to a federal court sitting in diversity, as has occurred here, the federal court must make an estimate of what the state's highest court would rule to be its law."

Cunninghame v. Equitable Life Assurance Society, 652 F.2d 306, 308 (2d Cir. 1981). *Accord, Huie v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977); *Orfield v. International Harvester Co.*, 535 F.2d 959 (6th Cir. 1976).

In light of the foregoing authorities, the Court is faced with the difficult task of predicting the manner in which the New York Court of Appeals would respond to identical circumstances. Since it appears no New York decision addresses the issue of negligent supervision in the context of franchise or distributor operations, we must look to applicable principles of tort liability as perceived by the New York Court of Appeals.

The question of duty turns on "whether the defendant is under any obligation for the benefit of the particular plaintiff." Prosser, Law of Torts §53, at 324 (4th ed. 1971). In the word of then Chief Judge Cardozo, such a

relation between the parties can be founded upon the foreseeability of harm:

> "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

Palsgraf v. Long Island R.R., supra at 344, 162 N.E. at 100.

Two recent New York decisions, *Havas v. Victory Paper Stock Co.*, 49 N.Y.2d 381, 402 N.E.2d 1136, 426 N.Y.S.2d 233 (1980), and *Pulka v. Edelman,* 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976), are instructive in that they appear to set bounds on the recognition of duty based on foreseesability.

In *Havas,* plaintiff, an employee of Morgan Guaranty Trust Co., was injured while assisting other trust company employees in loading bales of waste paper on a truck owned and operated by defendant, a paper stock company. Plaintiff sued the paper company on a negligence theory, and defendant impleaded plaintiff's employer. The duty of the trust company toward its employees was not at issue; rather, the Appellate Division overturned the jury verdict for plaintiff on the ground that no relation existed between the defendant paper company and plaintiff from which a duty of care could arise:

> "Given the undisputed factual pattern recited above we cannot perceive any duty or obligation running from defendant Victory to plaintiff Havas . . . . The loading operation was carried out by Morgan employees under the supervision of plaintiff, himself a Morgan employee. The ramp belonged to Morgan and Morgan gave the order or

> direction to plaintiff to use the same despite the latter's judgment that he should not. Victory's driver made no decisions as to how the bales should be loaded nor did he participate in the method of loading."

Havas v. Victory Paper Stock Co., 66 App. Div. 2d 953, 954, 411 N.Y.S.2d 452, 453 (3rd Dept. 1978).

The Court of Appeals reversed, finding that defendant owed a duty to plaintiff based solely upon the foreseeability of the risk of harm to plaintiff and defendant's relation to the circumstances. The court identified the analytical framework through which the existence of duty must be examined notwithstanding the absence of an independently cognizable relation between the parties:

> "[I]n a case which raises such traditional negligence law queries as does the one before us the answers are still to be found in the principle so pungently phrased by Cardozo that '[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation' (*Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 399, 344, 162 N.E. 99, 100). Or, as it is spelled out more precisely in the English case that is the progenitor of the foreseeability principle, '[W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger' (*Heaven v. Prender*, 11 QBD 503, 509, Britt, MR [1883])."

Havas v. Victory Paper Stock Co., 49 N.Y.2d at 386, 402 N.E.2d at 1138, 426 N.Y.S.2d at 236.

The analysis in *Havas* appears to be two-fold. First, the risk of injury to plaintiff must be reasonably foreseeable. Second, the court must determine whether the defendant "bore such a relation to the circumstances as to saddle it . . . with a duty to avoid the danger to be anticipated." *Id.* at 387, 402 N.E.2d at 1139, 426 N.Y.S.2d at 237. The precise circumstances in *Havas* are wholly distinct from the instant claim. Yet the process of analysis remains constant. The central idea is that the defendant, through its driver, "had a voice in directing the conduct" of the loading operation; therefore, defendant owed a duty to avoid subjecting plaintiff to the foreseeably hazardous situation to which the driver "at least acquiesced." *Id.*

In *Pulka,* the court examined the same issue, *viz.*, whether a duty may arise from foreseeability of harm, but reached the opposite conclusion. Plaintiff, a pedestrian, was struck by an automobile exiting from defendant's parking garage. The driver of the vehicle, not a garage employee, indisputably owed a duty to the plaintiff. But the question on appeal was whether the common practice of the garage patrons of exiting without checking for pedestrians gave rise to a duty owing pedestrians by the defendant garage to take preventive measures.

Holding that no duty existed, the majority of the court examined the two possible grounds upon which the duty to control others arises:

> "Commentators have pointed out that the duty to control others arises only in the following relationships: (1) '[t]he relationship between the defendant and the person who threatens the harm to the third person may be such as to require the

> defendant to attempt to control the other's conduct' or (2) 'there may be a relationship between the defendant and the person exposed to harm which requires the defendant to afford protection from certain dangers including the conduct of others' (Harper & Kime, Duty to Control the Conduct of Another, 43 Yale L.J. 886, 887-888)."

40 N.Y.2d at 783, 358 N.E.2d at 1021, 390 N.Y.2d at 395.

Thus, according to *Pulka,* the relationship between the defendant and either the third-party wrongdoer or the plaintiff may give rise to a duty of care. On the facts, the majority of the court found insufficient relation between the garage and the patron-driver to impose a duty, focusing on the defendant's lack of "reasonable opportunity" to control the patron and prevent the risk of harm. Further, in distinguishing the respective responsibilities of the driver and the garage, the court again focused on the concept of the defendant's opportunity to affect the degree of risk of harm:

> "Although it is reasonable to require one person to be responsible for the negligent conduct of another in some instances, it is unreasonable to impose the duty where the realities of every day experience show us that, regardless of the measures taken, there is little expectation that the one made responsible could prevent the negligent conduct."

Id. at 785, 358 N.E.2d at 1022, 390 N.Y.2d at 396.

Finally, the majority in *Pulka* expressed concern with the creation of legal duty based solely upon foreseeability, stating that foreseeability determines "the scope of duty

—only after it has been determined that there is a duty." *Id.* Taking what appears to be a different stance than the *Havas* majority, the court in *Pulka* appears to have concluded that since no relationship existed from which a duty could attach, foreseeability alone could not provide a basis for liability.

Yet the seeming conflict between the decisions in *Havas* and *Pulka* can be rationally resolved. The court in *Pulka* appears understandably reluctant to impose liability on a party who had insufficient relation to the wrongdoer or the plaintiff to prevent the harm. Mere foreseeability without relation cannot suffice. The distinction in *Havas* is the absence of a third-party wrongdoer. Without the additional actor between plaintiff and defendant, the analysis in *Havas* turns on the defendant's relationship to the circumstances. Liability in *Havas* was imposed because defendant had a direct voice in the risk involved, whereas, in *Pulka,* the absence of defendant's reasonable opportunity to mitigate the harmful conduct of departing motorists precluded imposition of legal duty. The essential issue in each case is identical: Does the defendant, who is at least partially responsible for the presence of hazardous circumstances or conduct have the capability to affect the degree of the risk of harm? If his relationship to either the circumstances or the intervening wrongdoer is such that he has reasonable opportunity to reduce the risk of foreseeable injury, a duty arises to do so.

Application of the foregoing principles leads this Court to conclude that the New York Court of Appeals would recognize a legal duty running from BMW/NA to plaintiff to prevent the risk of harm to BMW customers which results when dealers, whose financial instability and unscrupulous business practices are known to BMW/NA, are permitted to maintain the appearance of a responsible authorized BMW dealer subsequent to termination of the

dealer agreement. The instant circumstances appear well within the bounds set by the court in *Pulka*. Not only did there exist a significant relationship between BMW/NA and Bavarian, defendant had ample opportunity to prevent Bavarian from wrongfully obtaining plaintiff's money while holding itself out as an authorized dealer.

As the facts indicate, upon expiration of the dealer agreement, three weeks prior to the sales contract with plaintiff, defendant could have caused Bavarian to remove all BMW signs, refrain from using BMW trademarks and printed materials, and cease operating as an authorized BMW dealer. Thus, as in *Havas*, defendant acquiesced to circumstances which it should have reasonably known presented a substantial risk of harm to plaintiff. Most importantly, defendant had both opportunity and capability to decrease or foreclose the risk of harm. Therefore, a duty of care arose to avoid subjecting BMW customers to the unreasonable exposure to financial injury.

Since plaintiff has met its initial burden of proving facts which give rise to a legal duty on the part of BMW/NA for the protection of its retail customers, we turn now to defendant's argument that there was no breach of that duty.

Defendant, in sum, argues that BMW/NA was prohibited by law from terminating the franchise on the basis of Bavarian's known financial deficiencies. Citing 15 U.S.C. §§1221-25 and N.Y. Gen. Bus. Law §§195-98, defendant claims that in the circumstances of this case Bavarian could have successfully sued to enjoin any such termination. This argument fails for several reasons. First, the federal statute cited applies only to automobile manufacturers, and not to distributors in the absence of an indication of control by the manufacturers. See, *e.g.*, *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59 (9th Cir. 1973). Second, BMW/NA's right to terminate becomes moot in light of the expiration of the dealer agreement on

December 31, 1978. Third, the prohibition in N.Y. Gen. Bus. Law §197-a against refusal to renew automobile dealer agreements provides a good faith exception, and defendant has cited no case which enjoins such refusal under circumstances as egregious as those outlined in BMW/NA's letter dated December 18, 1978, Plaintiff's Exhibit 43.

Stripped of its purported legal barriers to definitively respond to Bavarian's continued deficiencies and questionable business practices, defendant is left without justification for failure to discharge its duty. The evidence shows that BMW/NA unreasonably allowed Bavarian to continue using the BMW name after expiration of the dealership and after notice of Eichler's propensity for unscrupulous business dealings. The evidence further shows that BMW/NA failed to supervise the operation of the franchise during this period of Bavarian's undefined existence and increased risk to customers. Plaintiff thus proved defendant's breach of duty.

Turning to the issue of causation, defendant contends that plaintiff's injury was not a reasonably foreseeable result of BMW/NA's negligence. Citing law "long established in New York," defendant argues that Eichler's conduct constitutes an intervening criminal act and hence necessarily breaks the causal chain, insulating defendant from liability. See, *e.g., Lowery v. Western Union Telegraph Co.*, 60 N.Y. 198 (1875).

Such a rule is by no means established in New York. Determination of proximate cause ultimately turns "upon the precise factual pattern of each individual case." *Hoggard v. Otis Elevator Co.*, 52 Misc. 2d 704, 707, 276 N.Y.S.2d 681, 686 (Sup. Ct. 1966), *aff'd mem.*, 28 App. Div. 2d 1207, 285 N.Y.S.2d 262 (1st Dept. 1967). See also *O'Neill v. City of Port Jervis*, 253 N.Y. 423, 433, 171 N.E.

694, 697 (1930). Moreover, an intervening act, tortious or criminal, will insulate a negligent defendant from liability only when the subsequent act could not have been reasonably anticipated by the first actor. *Lillie v. Thompson,* 332 U.S. 459 (1947); *Sherman v. Concourse Realty Corp.,* 47 App. Div. 2d 134, 365 N.Y.S.2d 239 (2nd Dept. 1975); Restatement of Torts 2d §§302B, 448-49.

The New York Court of Appeals has stated the rule as follows:

> "In this regard, it was plaintiffs' burden to show that defendants' conduct was a substantial causative factor in the sequence of events that led to [the] injury (see Restatement, Torts 2d §430; Prosser, Torts [4th ed.], §42). Of course, the fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard (see Restatement, Torts 2d, §§302B, 449; Prosser, Torts [4th ed.], at pp. 271-272)."

Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 520-21, 407 N.E.2d 451, 459, 429 N.Y.S.2d 606, 614 (1980).

Thus, the first step of analysis is to ascertain whether defendant's conduct was a substantial factor in bringing about plaintiff's harm. In other words, the Court must determine whether a reasonable person would regard BMW/NA's negligence a cause of Cullen's harm in the sense that it was "responsible" for the injury. *Hoggard v. Otis Elevator Co., supra,* 52 Misc. 2d at 707, 276 N.Y.S.2d at 686; Restatement of Torts 2d §433, Comment (a), at 429.

Here, the evidence shows that BMW/NA created a situation which afforded Bavarian the opportunity to defraud or steal from customers relying on the good reputation of BMW. Cullen walked into the showroom specifically relying on the publicly displayed BMW logo as representing a particular level of quality product. The situation here was such as to give him no notice of any deficiency in the franchise or Bavarian's relationship with BMW. BMW/NA, on the other hand, was well aware of Bavarian's impairment of BMW's reputation through various acts enumerated in the letter of December 18, 1978, yet it failed to take the available steps to prevent the further misuse of the BMW name and the misrepresentation that Bavarian continued to be an authorized BMW dealer. Moreover, knowing Bavarian's tenuous situation after expiration of the dealer agreement on December 31, 1978, BMW/NA failed to supervise its business dealings, thereby allowing Cullen to transact business with a "paper" BMW dealership lacking any tie with BMW whatsoever. These facts show that BMW/NA's conduct constituted a "substantial causative factor" in plaintiff's harm.

The second step under *Nallan v. Helmsley-Spear, Inc., supra,* requires the Court to determine whether Bavarian's intervening act was itself a foreseeable risk of BMW/NA's negligence. Stated differently,

> "a wrongdoer must answer for all the consequences that may ensue in the ordinary course of events, even though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated

> to produce the injurious result. The type of intervening cause which relieved all original wrongdoings is a cause which interrupts the natural sequence of events, so as decide their course, prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated."

Hoggard v. Otis Elevator Co., supra, 52 Misc. 2d at 708, 276 N.Y.S.2d at 687-88 (citations omitted).

The facts in evidence show that BMW/NA had knowledge of at least five recent incidents prior to Cullen's in which Bavarian had received partial payment for automobiles and had not delivered the cars. In some of these cases, Bavarian had issued checks on insufficient funds to refund the payments. Although the customer complaints were subsequently resolved, BMW/NA was apprised of Bavarian's propensity for unscrupulous business transactions. In this light, Eichler's conduct perpetuated rather than interrupted the "natural sequence of events" stemming from defendant's negligence. Moreover, "the exact occurrence or the precise injury" need not be foreseen. *Horstein v. General Motors Corp.*, 391 F. Supp. 1274, 1277 (S.D.N.Y. 1975). BMW/NA should have reasonably foreseen that Bavarian might have intentionally caused some financial harm to some BMW customer as a result of its original negligence, and this is sufficient.

According to the foregoing, judgment is entered for plaintiff in the amount of $18,000 plus interest thereon at the rate of 12% from April 13, 1979. Based on the evidence adduced at trial, punitive damages do not seem appropriate.

So Ordered.

The Clerk of the Court is directed to enter judgment for plaintiff and to forward copies of this memorandum of decision on reargument and order to counsel for the parties.

Dated: Brooklyn, New York
January 29, 1982

EDWARD R. NEAHER
U.S.D.J.

FOOTNOTES

[1]In *Cullen v. BMW of North America, Inc.*, 490 F. Supp. 246 (E.D.N.Y. 1980), we granted in part defendant's motion for summary judgment, leaving for further development of facts the issues of agency by estoppel and negligence discussed herein.

[2]Eichler and Bavarian were indicted for three counts of grand larceny in the second degree, the record of which was filed in the New York Supreme Court, Queens County, on March 6, 1980. Plaintiff's Exhibit 4. But apparently the indictments refer to conduct by the accused toward individuals other than Cullen. On February 5, 1981, Eichler pleaded guilty to attempted grand larceny in the second degree.

APPENDIX D.

Letter of BMW of North America, Inc., to Bavarian Auto Sales, Inc., Dated December 18, 1978.

BMW OF NORTH AMERICA, INC.

December 18, 1978

Bavarian Auto Sales, Inc.
51-17 Queens Boulevard
Woodside, N.Y. 11377

Attention: Mr. Hans W. Eichler, President

Dear Mr. Eichler:

BMW of North America, Inc. is presently distributing its new 1979 Dealer Agreement to all dealers who meet its minimum operating and financial standards. As you have been previously informed, your dealership has serious and continuing deficiencies, as a result of which you do not meet the minimum standards for a BMW dealership. Accordingly, we are unable to offer you a 1979 Dealer Agreement.

We are indicating below the deficiencies in your dealership which will have to be corrected for you to continue as a BMW dealer:

1. *Failure to Observe Minimum Wholesale Credit Requirement*—Section 1 (b) of your 1978 Dealer Operating Requirements Agreement.

As you are no doubt aware, pursuant to your 1978 Dealer Operating Requirements Agreement, which is a part of your 1978 Dealer Agreement, you undertook to

maintain a minimum wholesale credit line of $130,000 exclusively for the purchase of BMW vehicles. We have been advised by your bank, Israel Discount Bank Ltd., that on several occasions during 1978, most recently on November 21, 1978, your wholesale credit line could not accommodate the purchase of additional BMW vehicles. However, during this period the aggregate purchase price of BMW vehicles purchased by you from us during any calendar month was below the amount of your minimum wholesale credit line.

Our records also indicate that although a total of 90 BMW vehicles has been made available to you during the period from January 1, 1978 to November 2, 1978, you have purchased only 50 BMW vehicles from us. Of the 40 BMW vehicles refused, seven constituted your full allocation of 1979 model-year BMW vehicles. Consequently, it appears that you have used your minimum wholesale credit line, which was to be used only for the purchase of BMW vehicles, for other purposes.

We were informed on December 8, 1978 that you established a wholesale line of credit with the Lloyd Capital Corp. in the amount of $400,000. You assured us that this line of credit would be used exclusively for the purchase of BMW vehicles and, accordingly, you would be able to purchase and maintain an appropriate model range consistent with your current Dealer Operating Requirements Agreement.

On the strength of the Lloyd floor plan committment letter dated December 7, 1978, we allocated 28 new BMW vehicles to your dealership. Between December 13 and 14, nine of these vehicles were delivered to your dealership. On December 15, we were contacted by Mr. Ken Block of Lloyd Capital who called to inform us that the line of credit issued to Bavarian had been in response to Mr. Eichler's request that such a letter be provided to

BMWNA. It was clear from Mr. Block's comment that he had not anticipated that the line of credit would be drawn upon immediately. In that same conversation Mr. Block advised that your line of credit with his institution had been cancelled and that we would receive confirmation of this in writing. Today we received a mail-gram from Mr. Block confirming cancellation of the line. Based on this information, we had no alternative but to arrange for the pickup of these nine cars on Friday. Obviously this resulted in a significant inconveneince and additional cost to our company.

The cancellation of this line together with the inadequacy of the Israel Discount Bank line of credit effectively prohibits your dealership from meeting its obligations under your current BMW Operating Requirements Agreement.

2. *Impairment of Financial Reputation*—Paragraph 3(b) of Dealer Standard Provisions.

We are aware, of course, that you have chosen from time to time to supplement your inventory of new BMW vehicles through direct purchases from other authorized BMW dealers. Although we have no objections to this practice, we have been advised by four of these selling dealers that your checks to these dealers have been dishonored by your bank due to insufficient funds. Moreover, when you failed to make payment after repeated requests, these dealers requested that we assist them in the collection of the monies owed to them.

Despite our efforts to resolve this situation, including conversations and meetings with you dating from September 26, 1977, you have continued to "bounce" checks to other BMW dealers in connection with the purchase of BMW vehicles, most recently in September 1978.

We wish to inform you that any checks "bounced" in the future will not be tolerated.

3. *Parts Account Arrearages*—(Articles 7(s) and 8(b) of the Dealer Standard Provisions).

Although payment for your purchases of BMW parts must be made promptly, you have frequently permitted your parts account to become overdue and in a number of instances have made payment by checks which were dishonored by your bank due to insufficient funds. We have discussed this situation with you a number of times and have advised you by Mr. Scelsi's letter of July 7, 1977 and by Mr. Pokorny's letter of April 11, 1978 of your delinquent status and of the necessity of complying with our payment requirements. Moreover, in an attempt to assist you in resolving this situation, we have even extended, at your request and as an accommodation to you, the time for payment of your parts account balance during the summer of 1978.

Your history of arrearages has caused us to suspend your open account privileges from time to time and to require that your purchases be made on a C.O.D. basis. Most recently, on September 26, 1978, your continued late payments and dishonored checks and our ignorance with respect to your financial condition (as discussed in point 5 below) again caused us to place your parts account on a C.O.D. basis.

On Friday, December 15, we were advised by our bank that a check you had presented to our Parts Department the previous week, in payment of a C.O.D. parts pickup, was dishonored due to an uncertified check at this time while you were on certified check, C.O.D. basis. This was not meant to reflect a change in our requirements for your dealership, but was yet another accommodation to you.

The inadequacy of the check presented is yet another demonstration of your failure to comply not only with the terms and conditions of the BMW Dealer Agreement but with the spirit of our agreement as well.

4. *Failure to Observe Parts Inventory Requirements*—(Paragraphs 6(b) and 8(g) of the Dealer Standard Provisions and Article V(c) of your 1978 Dealer Operating Requirements Agreement).

Pursuant to your 1978 Dealer Operating Requirements Agreement, you agreed to maintain an inventory of BMW parts in adequate quantity and assortment to meet customers' requirements. On November 29, 1978, we were contacted by a customer whose BMW vehicle had been in your service department for approximately six weeks pending installation of a new transmission. You informed us that this delay was due to your lack of the necessary parts as a result of your inability to accept a C.O.D. delivery of such parts or to pay for such parts by certified check. To assist this customer, we were obligated to ship the parts to you on an open account basis notwithstanding the current C.O.D. status of your parts account.

Clearly, you are unable to fulfill the obligations of a BMW dealer to provide prompt service for owners of BMW vehicles if you cannot maintain an adequate inventory of BMW parts as a result of your inability to make payments for such parts.

5. *Submission of Financial and Operating Statements*—(Paragraph 10(b) (1) of the Dealer Standard Provisions).

Pursuant to the abovementioned Paragraph of the Dealer Standard Provisions, you have undertaken to provide us with both monthly and certified year-end financial

and operating statements. You have failed to comply with the requirement to submit certified year-end financial and operating statements since 1975 and have frequently been delinquent in supplying monthly financial and operating statements. Moreover, even when you have provided us with monthly financial and operating statements, such statements have not appeared to accurately reflect your true financial condition, especially in light of the status of your parts account and the frequency of dishonored checks. Accordingly, we have been unable to develop operating statistics for your BMW operations or to assess your financial status and the adequacy of your financial management. This situation also has precluded us from offering concrete suggestions and assistance with respect to your current operations as well as with respect to future planning.

Various BMW personnel have met with you on a number of occasions to discuss the deficiencies cited above and the actions which would have to be taken by you to rectify these deficiencies. To date, our efforts have not resulted in the satisfactory correction of your deficiencies.

However, if you are interested in continuing as a BMW dealer, please contact us by January 5, 1979 to discuss with you in greater detail the deficiencies cited above and the action which would have to be taken by you in order to rectify such deficiencies. If we can reach a satisfactory understanding with respect to these matters, we will send you a written confirmation of our intention to offer you a 1979 dealer agreement, which confirmation will set forth in detail the deficiencies to be rectified, the corrected measures to be taken and the time period in which this may be accomplished.

Should we fail to hear from you by the 5th of January, please be advised that we shall consider your failure to respond as a voluntary termination to our relationship.

In the event of such termination, we wish to inform you that we are prepared to fulfill our repurchase obligation in accordance with Paragraph 13 of the Dealers Standard Provision.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

BMW OF NORTH AMERICA, INC.
FRIEDRICH HANAU,
Vice President
Automotive Operations

FH:mw

Certified Mail
Return Receipt Requested
No. 657561

APPENDIX E.

Inter-Branch Memo, J. G. Trontell to R. T. Cronin, Dated September 1, 1978.

BMW *Inter-Branch Memo* T. SCELSI

To: R. T. Cronin Date: September 1, 1978

From: J. G. Trontell Re: Bavarian Auto Sales—Woodside, NY

On August 30, 1978, Andy Pokorny, Tony Scelsi, and I conducted a joint visit with Hans Eichler, President of Bavarian Auto Sales.

The purpose of this visit was to discuss the proper conduct of business relationships at Bavarian Auto Sales, with particular emphasis focused on their relevance to BMW of North America, Inc.

Specific topics of discussion were:

1) The increase of available floor plan funds to ensure a free and unencumbered $400,000 line. (sixty-day deadline)

2) Realignment with the banking institution of Bavarian's choice to achieve the desired floor line. (Marine Midland or First National City)

3) Relocation and consolidation of the split facility. (sixty-day deadline)

4) Strict compliance with policies and procedures as delineated in the BMW of North America, Inc., contract provisions. (immediate)

5) Reconciliation of delinquent accounts with members of the BMW dealer body, and its vendors, which would adversely affect, or involve, BMW of North America, Inc. (immediate)

The intent of this discussion was to ensure that in the ensuing sixty day period following the meeting, Bavarian Auto Sales would once again become a viable point in the BMW dealer network.

Should these topics not be reconciled in the specified period, BMW of North America would review the viability and potential longevity of Bavarian Auto Sales in the dealer body.

JOHN G. TRONTELL

FILED
MAR 11
ALEXANDER L. STEVAS,
CLERK

No. 82-1372

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS W. CULLEN, JR.,

Petitioner,

vs.

BMW OF NORTH AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT BMW OF NORTH AMERICA, INC. IN OPPOSITION

IRA M. MILLSTEIN
Attorney for Respondent
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Of Counsel:
KEVIN P. HUGHES
YVETTE MILLER
WEIL, GOTSHAL & MANGES

Question Presented

Whether this Court should grant *certiorari* to review a Court of Appeals decision which reversed the trial court as a matter of law on an issue of state law in a diversity action?

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General Box Co. v. United States, 351 U.S. 159 (1956) 9

O'Boyle v. Avis Rent-A-Car System, Inc., 78 App. Div. 2d 431 (2d Dep't 1981) 6

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Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) 9

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Statutes:

Rule 17, United States Supreme Court Rules 8
Rule 52(a), Federal Rules of Civil Procedure 7
Rule 52(b), Federal Rules of Civil Procedure 6
Rule 59(e), Federal Rules of Civil Procedure 6

Other Authorities:

R.L. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 10

No. 82-1372

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS W. CULLEN, JR.,

Petitioner,

vs.

BMW OF NORTH AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT BMW OF NORTH AMERICA, INC. IN OPPOSITION

Statement of the Case

The Court of Appeals decided two narrow questions in this case: whether, under New York common law, an automobile franchisor has an affirmative duty to supervise the day-to-day activities of its independent franchisees; and whether under New York common law, a franchisor, in the absence of any agency relationship, is liable for the criminal conduct of its franchisee? The United States Court of

Appeals for the Second Circuit answered those questions in the negative.[1]

The Parties

BMW of North America, Inc.

BMW of North America, Inc. ("BMW/NA") is the exclusive importer and distributor in the United States of passenger cars, parts, and products manufactured by Bayerische Motoren Werke, A.G.[2] A Delaware corporation, BMW/NA has its principal place of business at Montvale, New Jersey. The sale and servicing of BMW vehicles imported into the United States by BMW/NA is conducted at the retail level by a network of franchised dealers. BMW/NA franchised dealers are independent business people who are granted authorized retail dealerships in accordance with the provisions of a standard Dealer Agreement; the Dealer Agreement sets forth the respective duties, obligations, and responsibilities of both BMW/NA and the dealer, and provides, essentially, that BMW/NA shall sell to the dealer and that the dealer shall purchase from BMW/NA, BMW products. The Dealer Standard Provisions, the terms of which expressly negate any agency relationship, are made a part of the Dealer Agreement.

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1. References to the Second Circuit's opinion, contained in Appendix A of the petition, are denoted by "P. App. A——"; references to the District Court opinion of January 29, 1982, contained in Appendix C of the petition, are denoted by "P. App. C——"; references to the District Court opinion of October 28, 1981, contained in Appendix A to this Brief, are denoted by "R. App. A——"; references to the District Court opinion of May 16, 1980, granting partial summary judgment, contained in Appendix B to this Brief, are denoted by "R. App. B——." All citations to the petition are denoted by "Pet. ——."

2. BMW/NA is a wholly owned subsidiary of BMW Holding Co., which is wholly owned by Bayerische Motoren Werke, A.G.

Plaintiff

Plaintiff, a New York stockbroker, and his wife, on their way to a dinner appointment, drove past the Bavarian Auto Sales, Inc. ("Bavarian") showrooms and decided to look for a car, having previously talked about buying a BMW automobile. Plaintiff picked out a BMW model 530i and gave the Bavarian salesman a deposit of $245. (This check was never cashed by Bavarian.) About five days later, plaintiff received a phone call from the salesman advising that the car had come in. Plaintiff was asked to send in a check for $18,000, the balance of the purchase price, which he did, although not without misgivings, on February 5, 1979. After plaintiff mailed the check to Bavarian, he called Bavarian several times asking for the car, but there were "a series of delays and runarounds" and he was given a variety of excuses. Not once, however, did he return to the Bavarian showroom to demand the car or the return of his money. And, at no time prior to the commencement of this action did plaintiff have any contact, either by telephone, in person, or by mail, with anyone at BMW/NA.

As a result of the failure of his efforts to obtain the vehicle or the return of his $18,000, plaintiff apparently consulted his attorney. Together, they filed criminal complaints with the Queens County District Attorney and the Attorney General of the State of New York, and perhaps contacted the New York City Department of Consumer Affairs. An action was commenced against Hans Eichler, Bavarian's principal, in Supreme Court, Nassau County, to recover the sum paid to Bavarian for the vehicle on the theory that Eichler had committed fraud. This action was subsequently commenced, as well.

Prior Proceedings

The Complaint

As amended, the complaint alleged four separate theories of liability: (1) that Bavarian was acting as agent for BMW/NA pursuant to principles of either actual agency or agency by estoppel (apparent agency); (2) that BMW/NA was negligent in permitting Bavarian to continue as a dealer because it had knowledge of Bavarian's allegedly precarious financial condition; (3) that BMW/NA entered into a conspiracy with Eichler, and in fact did defraud customers into doing business with Eichler; and (4) that BMW/NA's conduct constituted a prima facie tort.

At the conclusion of discovery, BMW/NA moved for summary judgment dismissing each of plaintiff's claims for relief. Addressing plaintiff's agency theories of liability first, the District Court found that "Bavarian was an independently owned and operated dealer, authorized to sell BMW automobiles, among others," therefore concluding that an actual agency relationship did not exist between BMW/NA and Bavarian. (R. App. B8b.) It also found no evidence to support plaintiff's causes of action for conspiracy to commit fraud and prima facie tort, and dismissed those claims as well. (R. App. B10b.) As to plaintiff's negligence claims, the District Court held that genuine issues as to material facts precluded the grant of summary judgment (R. App. B6b); similarly, it held that although plaintiff's agency by estoppel claim "might be difficult to establish at trial, plaintiff should have the opportunity to present the issue to a trier of fact." (R. App. B9b.) Thus, only the theories of negligence and agency by estoppel were left to be tried.

The District Court

Almost one year after the three-day non-jury trial, the District Court rendered a decision sustaining plaintiff's negligence theory of liability. As to the theory of agency by estoppel, the District Court found a "lack of proof of its essential elements" (R. App. A6a), specifically pointing to plaintiff's failure "to prove his reliance on Bavarian's *authority to act* for BMW/NA." (Emphasis in original.)

> Similarly, there [was] no evidence of Cullen's belief that the transaction was entered into by or for BMW/NA. On the contrary, plaintiff's own testimony shows there was an absence of reliance on advertisements, on the similarity between the corporate names of Bavarian and BMW/NA (Bavarian Motor Works), or on the BMW logo appearing on the sales slip.
>
> Plaintiff did testify as to his reliance on the BMW logo appearing on the outside of Bavarian's premises, but the question remains to what his reliance was directed. The testimony shows not a belief that Bavarian had authority to act for BMW/NA, but that the BMW logo represented a particular quality of cars sold at Bavarian. Since this testimony indicates, at most, Cullen's reliance on Bavarian's authority to sell BMW automobiles, plaintiff failed to carry its burden of proving the belief essential to agency by estoppel.

(R. App. A7a-8a.)

As to plaintiff's negligence theory of liability, however, the District Court rejected BMW/NA's argument that it owed no duty to plaintiff, finding instead that "plaintiff met its initial burden of proving facts which give rise to a

legal duty on the part of BMW/NA, for the protection of its franchisees' customers, to reasonably police the authorized use of the BMW name and supervise the operation of its franchise." (R. App. A10a-11a.) Basing its imposition of duty on two New York cases which purportedly supported its conclusion, the District Court held that

> Beyond its contractual obligations, BMW/NA, as the exclusive distributor of BMW products, owes the ultimate consumer a duty to actively police the authorized use of the BMW name and trademarks and to supervise its dealers' agents and employees in the operation of the franchised dealerships.

(R. App. A9a.)

But, the two cases which the District Court claimed established such a duty, *O'Boyle* v. *Avis Rent-A-Car System, Inc.*, 78 App. Div. 2d 431 (2d Dep't 1981); and *People* v. *Ludwig Baumann & Co.*, 56 Misc. 2d 153 (Sup. Ct. New York County 1968), did not, in fact, support the legal conclusions reached by the District Court. The *Avis* case involved the application of the long-established rule in New York that a principal (Avis) is responsble to a third person (O'Boyle) who is injured as a result of the acts of its agent. The imposition of liability in the *Baumann* case was predicated on the basis of the doctrine of agency by estoppel. In these circumstances, since the District Court had specifically negated the existence of both an agency relationship between BMW/NA and Bavarian, and agency by estoppel, BMW/NA moved the District Court, pursuant to Rules 52(b) and 59(e) of Fed.R.Civ.P., to amend the judgment to provide for dismissal of plaintiff's claims. (P. App. C2c.)

In response to BMW/NA's motion, the District Court rewrote its opinion, abandoned its reliance on the above two cases, and instead purported to "predict" that the New York Court of Appeals would come to the same result it reached if presented with the trial record established in this action. Relying on two recent Court of Appeals decisions applying well-established New York tort principles, the District Court "predicted" that

> the New York Court of Appeals would recognize a legal duty running from BMW/NA to plaintiff to prevent the risk of harm to BMW customers which results when dealers, whose financial instability and unscrupulous business practices are known to BMW/NA, are permitted to maintain the appearance of a responsible authorized BMW dealer subsequent to termination of the dealer agreement.

(P. App. C15c.)

The Court of Appeals

The Court of Appeals reversed the District Court's holding as a matter of law.[3] First, it held that "BMW/NA . . . did not owe a duty to supervise the operation of Bavarian and to terminate the franchise. . . ." (P. App. A2a.) It also found that the District Court had incorrectly determined that Cullen's injury was reasonably foreseeable and "erred in finding BMW/NA liable for negligent failure to police the operations of its independent franchisee" because of Bavarian's intervening criminal conduct. (P.

3. Petitioner's claim that the Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure (Pet. 5) is therefore misplaced. By its terms, Rule 52(a)'s reference to "a clearly erroneous" standard of review applies only to findings of fact, not conclusions of law. (Pet. 2-3.)

App. A7a.) In support of this finding, the Court of Appeals relied on well-established New York negligence principles which hold that,

> an intervening act, tortious or criminal, will ordinarily insulate a negligent defendant from liability when the subsequent act could not have been reasonably anticipated by the defendant. *Tirado* v. *Lubarsky*, 49 Misc. 2d 543, 268 N.Y.S.2d 54 (N.Y. Civ. Ct.), *aff'd*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (N.Y. App. Div. 1966).

(P. App. A8a.)

In reversing the District Court, the Court of Appeals did not disturb any of the lower court's factual findings; rather, it found that those findings did not support the legal conclusions which the District Court had derived therefrom.

REASONS FOR DENYING THE WRIT

The Holding of the Courts Below Presents No Question of General Importance Warranting Review By This Court

A review on writ of *certiorari* should be granted "only when there are special and important reasons therefor," such as where the decision presents a conflict among the Circuit Courts, a conflict with prior decisions of this Court, or "an important question of federal law which ha[s] not been, but should be, settled by this Court." Rule 17, United States Supreme Court Rules.

None of these considerations warranting review on *certiorari* is present here. Moreover, neither the District Court nor the Court of Appeals decided a novel, or im-

portant legal issue in a manner which requires review by this Court. Rather, the Court of Appeals resolved a purely state law issue by the application of well-established principles of New York law.

Under such circumstances, this Court has almost uniformly declined to overturn the decisions of the Courts of Appeal. *See, e.g., Commissioner* v. *Estate of Bosch,* 387 U.S. 456, 462 (1967) ("The issue presents solely a question of state law and '[w]e ordinarily accept the determination of local law by the Court of Appeals . . . and we will not disturb it here,' " quoting *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949)); *Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1963) ("the controversy . . . primarily implicates questions of Pennsylvania law and presents no federal question of substance. In the circumstances, the writ of certiorari as to that judgment of the Court of Appeals is dismissed as improvidently granted"); *General Box Co.* v. *United States,* 351 U.S. 159, 165 (1956) ("We ordinarily accept the determination of the Court of Appeals on questions of local law and we do so here").

The decision of this Court in *The Tungus* v. *Skovgaard,* 358 U.S. 588 (1959) is particularly instructive here. In that case, one of the issues the Court of Appeals was asked to resolve was whether state law imposed upon defendants a duty of exercising ordinary care. This Court found that the "Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey," *id.* at 594, and had no reason to question the disposition of the case. *Id.*

This Court, moreover, has also been reluctant to reverse even those decisions of the Courts of Appeal which

arguably conflict with applicable local law, particularly those decisions relating to negligence, contracts, and property. R.L. Stern & E. Gressman, *Supreme Court Practice* 283 (5th ed. 1978) ("Stern & Gressman"). Thus, this Court, in *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701 (1949), found it sufficient to sustain the Court of Appeals' holding that reasonable arguments could be made, based on state law cases, to support a determination of the issue either for or against petitioner's claim. *Id.* at 708. *See also Ross* v. *Moffitt*, 417 U.S. 600, 618 (1974) (the Supreme Court's review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review"). For that reason,

> [u]nless there is an exceptionally clear showing of error by the court of appeals, the Court is likely to give scant consideration to a certiorari petition based upon such a conflict. The Court uniformly declines review whenever the court of appeals has reached a reasonable and permissible result.

Stern & Gressman, *supra*, at 283.

Because the question which this Court is now being asked to consider is exclusively a state law issue, and, in any event, there has not been "an exceptionally clear showing of error" (indeed, petitioner claims none), we respectfully suggest that this Court should not grant *certiorari*.

Conclusion

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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March 10, 1983

APPENDIX A

Memorandum of Decision and Order (October 28, 1981)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

79 C 970

THOMAS W. CULLEN, JR.,

Plaintiff,

against

BMW OF NORTH AMERICA, INC.,

Defendant.

Appearances:

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Appendix A

NEAHER, District Judge.

Plaintiff, Thomas W. Cullen, Jr., seeks to recover $18,000 with interest, plus punitive damages, paid to Bavarian Auto Sales, Inc. (Bavarian), a BMW dealer formerly franchised by defendant, BMW of North America, Inc. (BMW/NA). BMW/NA is "the exclusive importer and distributor in the United States of passenger cars, parts and products manufactured by Bayerische Motoren Werke, AG." Plaintiff's Exhibit 93. A Delaware corporation, BMW/NA has its principal place of business at Montvale, New Jersey. This diversity action is now before the Court subsequent to partial summary judgment in favor of defendant and trial without a jury on the remaining issues.[1]

The facts established at trial follow. On January 24, 1979 Cullen entered into a sales contract with Bavarian for a new 1978 BMW, Model 530i, at a price of $18,245. Having paid a deposit of $245, Cullen received a call five days later from the salesman advising that the car had arrived and requesting a check for the balance of the purchase price. Plaintiff remitted a check for $18,000, which was cashed by Bavarian, but never received the car or the return of his money.

Cullen commenced a civil action against Bavarian in New York State Supreme Court, Nassau County, which was stayed when Bavarian's president, Hans Eichler, filed a petition in bankruptcy. Cullen also filed criminal complaints

1. In *Cullen* v. *BMW of North America, Inc.*, 490 F. Supp. 249 (E.D.N.Y. 1980), we granted in part defendant's motion for summary judgment, leaving for further development of facts the issues of agency by estoppel and negligence discussed herein.

with the Queens County District Attorney and the Attorney General of the State of New York, although no indictments were issued.[2] This action was subsequently commenced.

Bavarian operated continuously as an authorized BMW dealer from at least June of 1976 to February 16, 1979, on which date Eichler voluntarily terminated all agreements between Bavarian and BMW/NA. Three written franchise agreements were entered into during this time: (1) from June 1 to December 31, 1976; (2) from August 12 to December 31, 1977; and (3) from January 1 to December 31, 1978. Although no written agreement was in effect from January 1 to August 12, 1977 or from January 1 to February 16, 1979, Bavarian continued to operate as a duly franchised BMW dealer during these periods. In fact, recognizing the continuation of dealerships without formal agreement is not an unusual practice for BMW/NA. Trial Transcript at 2.125-26.

From the beginning of Bavarian's relationship with BMW/NA, the latter received indications of Bavarian's financial instability. For example, difficulty in receiving payment for cars and parts prompted BMW/NA to place Bavarian on a C.O.D. certified check basis, rather than open account status, in the latter part of 1976. Additionally, despite Bavarian's contractual obligations and BMW/NA's repeated requests, Bavarian furnished only two monthly financial statements during the several years it operated.

2. Eichler and Bavarian were indicted for three counts of grand larceny in the second degree, the record of which was filed in the New York Supreme Court, Queens County, on March 6, 1980. Plaintiff's Exhibit 4. But apparently the indictments refer to conduct by the accused toward individuals other than Cullen. On February 5, 1981, Eichler pleaded guilty to attempted grand larceny in the second degree.

Further, from 1976 onward, Bavarian demonstrated persistent difficulty in maintaining minimum credit lines essential to standard operation of BMW dealerships. Finally, throughout the operation of the franchise Bavarian repeatedly failed to maintain sufficient funds to enable legitimate issuance of checks to BMW/NA, other BMW dealers, and customers.

During the latter part of 1978, Bavarian's instability escalated, and BMW/NA received intensified indications of its financial irregularities and irresponsibility. For example, from July to September 1978, BMW/NA received five customer complaints against Bavarian, each of which alleged Bavarian had taken partial payment for a car but had neither delivered the vehicle nor refunded the payment. In some of these cases, Bavarian had issued checks on insufficient funds to refund deposits made by the customers. Further, during 1978, checks aggregating some $40,000 were issued by Bavarian to BMW/NA upon accounts with insufficient funds.

On October 30, 1978, BMW/NA extended an initial sixty-day period granted Bavarian to re-establish its financial viability. This period was extended to November 14, 1978, but Bavarian still failed to remedy its deficiencies by that date.

On November 15, 1978, Bavarian represented to BMW/NA that approval of funds from the Small Business Administration and Citibank was imminent, but no such approval ensued. On December 7, 1978, BMW/NA received notice from Lloyd Capital Corporation that Bavarian had established a line of credit, but a week later BMW/NA learned that Eichler had misrepresented his intention to follow

through with the credit application process, had never signed a formal agreement with Lloyd, and had never paid Lloyd the $1000 required by law to be submitted prior to execution of the agreement.

In a letter dated December 18, 1978, BMW/NA notified Eichler that because of "serious and continuing deficiencies" in the dealership, BMW/NA would not offer him a 1979 dealer agreement. The deficiencies outlined in the letter were: (1) failure to observe minimum wholesale credit requirement; (2) impairment of financial reputation, including issuance of checks, later dishonored, to other BMW dealers; (3) parts accounts arrearages, including issuance of checks, later dishonored, to BMW/NA; (4) failure to observe parts inventory requirements; and (5) failure to submit year-end and monthly financial and operating statements.

Although Eichler responded to the above letter on December 29, 1978, expressing his desire to continue the dealership, BMW/NA did not reply to confirm either termination or extension of the franchise. The next contact evidences BMW/NA's recognition of the continued operation of the Bavarian franchise: it refused to authorize Eichler's proposed sale of Bavarian to an existing dealer. Had BMW/NA asserted its rights under the dealer agreement, which had expired by its own terms on December 31, 1978, it could have insisted that Bavarian remove at its own expense all BMW signs displayed publicly, refrain from using BMW trademarks, destroy all printed material bearing BMW trademarks, and cease to hold itself out as an authorized BMW dealer. Plaintiff's Exhibit 103. Further, BMW/NA could have required Bavarian to sell and de-

liver to BMW/NA all new vehicles, parts and tools purchased by Bavarian from BMW/NA. Instead, BMW/NA allowed Eichler to continue holding out Bavarian as an authorized dealership, as evidenced by the BMW logo publicly displayed on the outside of the showroom and the use of printed materials bearing BMW trademarks.

It should be noted that August 1978 was the last time BMW/NA received payment for any cars allocated to Bavarian. Further, in December 1978 BMW/NA removed all cars it had delivered to Bavarian for failure to maintain a minimum credit structure. Yet, during January and February of 1979, the showroom contained several new BMW vehicles borrowed from other dealers, thus giving Bavarian the appearance of a viable ongoing business.

On February 13, 1979, a meeting was held to discuss the future of Bavarian. This meeting was approximately two weeks after Cullen had been denied delivery of the car, and although Cullen had not contacted BMW/NA, at the meeting BMW/NA was apprised of information that Eichler had accepted deposits from seven customers totalling $100,000 and had used the money for other purposes. Still, BMW/NA made no definitive response, and three days later Eichler voluntarily resigned the franchise. Only at that point did BMW/NA pursue its rights subsequent to termination outlined above.

The record is clear that Bavarian was an independently owned and operated dealership, but plaintiff seeks to hold BMW/NA liable under the doctrine of agency by estoppel. This theory must fall for lack of proof of its essential elements. It is well settled that agency by estoppel arises only when the party charged as principal intentionally or care-

lessly causes the belief that the putative agent is authorized to bind that party. *Karavos Compania Naviera S.A.* v. *Atlantic Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978); Restatement of Agency 2d §8B; 2 N.Y.Jur., Agency §§25, 87. Moreover, under New York law,

> "apparent or ostensible authority, or agency by estoppel, is created only by acts or neglects of the person sought to be charged as principal, and the person dealing with the ostensible agent must have known of and relied upon such acts or omissions, and such reliance must be in good faith and in the exercise of reasonable prudence." *Perry* v. *New York Life Ins. Co.*, 22 N.Y.S.2d 696, 701-02 (Sup. Ct. 1940).

Although plaintiff offered into evidence various public manifestations of a relationship between Bavarian and BMW/NA, he failed to prove his reliance on Bavarian's *authority to act* for BMW/NA. Similarly, there is no evidence of Cullen's belief that the transaction was entered into by or for BMW/NA. On the contrary, plaintiff's own testimony shows there was an absence of reliance on advertisements, on the similarity between the corporate names of Bavarian and BMW/NA (Bavarian Motor Works), or on the BMW logo appearing on the sales slip.

Plaintiff did testify as to his reliance on the BMW logo appearing on the outside of Bavarian's premises, but the question remains to what his reliance was directed. The testimony shows not a belief that Bavarian had authority to act for BMW/NA, but that the BMW logo represented a particular quality of cars sold at Bavarian. Since this testimony indicates, at most, Cullen's reliance on Bavarian's authority to sell BMW automobiles, plaintiff

failed to carry its burden of proving the belief essential to agency by estoppel.

Turning to plaintiff's negligence theory, the evidence adduced at trial shows that BMW/NA unreasonably permitted Bavarian to continue holding itself out to the public as an authorized BMW dealer, and to purport to sell Cullen a car, during a period in which defendant had ample knowledge of Bavarian's precarious financial condition and history of questionable business practices. Yet, proving the unreasonableness of defendant's conduct does not establish actionable negligence. To accomplish the latter plaintiff must first sustain his burden of proving the breach of a legal duty owing by defendant to plaintiff, a violation of plaintiff's rights. *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Defendant argues that BMW/NA owed Cullen no duty to enforce the provisions of its agreement with Bavarian, based on plaintiff's inability to claim as a third-party beneficiary under that contract. The argument is correct as far as it goes, for it is true that the parties to the agreement, in establishing their distributor/dealer relationship, expressed no intent to confer a direct benefit on ultimate consumers. In the absence of such expression, plaintiff assumes the status of an incidental beneficiary, unable to enforce contractual rights or recover for failure to perform contractual duties. *Bernal* v. *Pinkerton's, Inc.*, 52 App. Div. 2d 760, 382 N.Y.S.2d 769 (1st Dept. 1976), *aff'd*, 41 N.Y.2d 938, 363 N.E.2d 362, 394 N.Y.S.2d 638 (1977); *Beck* v. *FMC Corp.*, 53 App. Div. 2d 118, 385 N.Y.S.2d 956 (4th Dept. 1976), *aff'd*, 42 N.Y.2d 1027, 369 N.E.2d 10, 398 N.Y.S.2d 1011 (1977).

Yet the Court is not willing to take such a narrow view of BMW/NA's duty. Beyond its contractual obligations, BMW/NA, as the exclusive distributor of BMW products, owes the ultimate consumer a duty to actively police the authorized use of the BMW name and trademarks and to supervise its dealers' agents and employees in the operation of the franchised dealerships. Cognizant of our function, sitting in a diversity action, to ascertain not what New York law should or will be, but what it is, *Hausman* v. *Buckley*, 299 F.2d 696, 704 (2d Cir.), *cert. denied*, 396 U.S. 885 (1962), we would not impose such a duty were its substance not already established by previous law.

In *O'Boyle* v. *Avis Rent-A-Car System, Inc.*, 78 App. Div. 2d 431, 435 N.Y.S.2d 296 (2d Dept. 1981), co-defendant G. Roland House owned and operated a gasoline station and an Avis car rental franchise. A vehicular accident occurred when a 16-year-old employee of House, while driving a rental car, collided with another vehicle. The victims or their representatives not only sued the unlicensed employee but also advanced a negligence theory against both House and Avis. The trial court, in charging the jury on negligence, explained the plaintiff's theory against Avis as follows:

> "Then, as far as the Defendant Avis is concerned . . . that they [sic] were negligent in failing to supervise its agents, in failing to supervise its franchises' agents in the operation of its automobile rental agencies, failing to properly train its franchises' agents in the operation [and] management and so forth of the rental agency." 78 App. Div. 2d at 436-37, 435 N.Y.S.2d at 299.

Appendix A

The question before the appellate court in *Boyle* was whether the verdict against both defendants was tenable. In affirming, the court held that the evidence sustained a finding that each defendant was negligent under the theory posited against it and that the cited omissions proximately caused the injuries. The court therefore implicitly found a legal duty owing foreseeable plaintiffs by Avis to properly supervise the operation of its rental franchise.[3]

Further, in *People* v. *Ludwig Baumann & Co.*, 56 Misc. 2d 153, 288 N.Y.S.2d 404 (Sup. Ct. 1968), a proceeding to enjoin bait and switch advertising under N.Y. Gen. Bus. Law §396, the franchisor was held responsible for the franchisee's fraudulent business practices, even though it lacked knowledge of those practices. Holding that "any reputable business firm" is under a legal duty "to allow its name to be used only where it takes active steps to prevent the misuse of its name for the purposes of fraud and deceit," the court concluded that public policy could not "condone the practice of licensing use of a business or trade name without undertaking to guard against its misuse . . . in the sale of products." 56 Misc. 2d at 158, 288 N.Y.S.2d at 410.

Having proved that Bavarian was a former BMW/NA franchised dealer,[4] plaintiff met its initial burden of prov-

3. Although some of the appellate court's language was couched in terms of agency, there was no discussion of an agency relationship between Avis and House, nor would the facts appear to support such a theory. Further, the negligence theory posited against Avis in the quoted jury charge clearly states Avis' duty "to supervise its franchises' agents." This was the theory of liability on which the verdict, subsequently upheld, was based.

4. Although there appears to have been no sale of a franchise between BMW/NA and Bavarian so as to bring their relationship within the definition provided by the New York Franchise Sales Act,

(footnote continued on next page)

ing facts which give rise to a legal duty on the part of BMW/NA, for the protection of its franchisees' customers, to reasonably police the authorized use of the BMW name and supervise the operation of its franchise. We turn now to defendant's argument that there was not breach of that duty.

Defendant, in sum, argues that BMW/NA was prohibited by law from terminating the franchise on the basis of Bavarian's known financial deficiencies. Citing 15 U.S.C. §§1221-25 and N.Y. Gen. Bus. Law §§195-98, defendant claims that in the circumstances of this case Bavarian could have successfully sued to enjoin any such termination. This argument fails for several reasons. First, the federal statute cited applies only to automobile manufacturers, and not to distributors in the absence of an indication of control by the manufacturer. See, *e.g., Stansifer* v. *Chrysler*

N.Y. Gen. Bus. Law §681(3), defendant itself recognizes that Bavarian was a "BMW/NA franchised dealer." Defendant's Post-Trial Memorandum of Law, at 1. Moreover, the restrictive definition of "franchise" in the Franchise Sales Act, which took effect January 1, 1981, could hardly be held to define the relationship of Bavarian to BMW/NA from June 1976 to February 1979. Under modern-day practices, franchise is commonly understood as an agreement

> "under which the franchisee undertakes to conduct business or sell a product or service in accordance with methods and procedures prescribed by the franchisor and the franchisor undertakes to assist the franchisee through advertising, promotion, and other advisory services."

1 G. Glickman, Franchising §2.01, at 2-2.1 (1981). The facts at trial showed the existence of such a relationship between BMW/NA and Bavarian.

As a further note, however the relationship is defined, it is clearly sufficient to justify imposition of the duty recognized in *O'Boyle* v. *Avis Rent-A-Car Systems, Inc.*, 78 App. Div. 2d 431, 435 N.Y.2d 296 (2d Dept. 1981), in extremely similar circumstances.

Motors Corp., 487 F.2d 59 (9th Cir. 1973). Second, BMW/NA's right to terminate becomes moot in light of the expiration of the dealer agreement on December 31, 1978. Third, the prohibition in N.Y. Gen. Bus. Law §197-a against refusal to renew automobile dealer agreements provides a good faith exception, and defendant has cited no case which enjoins such refusal under circumstances as egregious as those outlined in BMW/NA's letter dated December 18, 1978, Plaintiff's Exhibit 43.

Stripped of its purported legal barriers to definitively respond to Bavarian's continued deficiencies and questionable business practices, defendant is left without justification for failure to discharge its duty. The evidence shows that BMW/NA unreasonably allowed Bavarian to continue using the BMW name after expiration of the dealership and after notice of Eichler's propensity for unscrupulous business dealings. The evidence further shows that BMW/NA failed to supervise the operation of the franchise during this period of Bavarian's undefined existence and increased risk to customers. Plaintiff thus proved defendant's breach of duty.

Turning to the issue of causation, defendant contends that plaintiff's injury was not a reasonably foreseeable result of BMW/NA's negligence. Citing law "long established in New York," defendant argues that Eichler's conduct constitutes an intervening criminal act and hence necessarily breaks the causal chain, insulating defendant from liability. See, *e.g.*, *Lowery* v. *Western Union Telegraph Co.*, 60 N.Y. 198 (1875).

Such a rule is by no means established in New York. Determination of proximate cause ultimately turns "upon

the precise factual pattern of each individual case." *Hoggard* v. *Otis Elevator Co.*, 52 Misc. 2d 704, 707, 276 N.Y.S.2d 681, 686 (Sup. Ct. 1966), *aff'd mem.*, 28 App. Div. 2d 1207, 285 N.Y.S.2d 262 (1st Dept. 1967). See also *O'Neill* v. *City of Port Jervis*, 253 N.Y. 423, 433, 171 N.E. 694, 697 (1930). Moreover, an intervening act, tortious or criminal, will insulate a negligent defendant from liability only when the subsequent act could not have been reasonably anticipated by the first actor. *Lillie* v. *Thompson*, 332 U.S. 459 (1947); *Sherman* v. *Concourse Realty Corp.*, 47 App. Div. 2d 134, 365 N.Y.S.2d 239 (2d Dept. 1975); Restatement of Torts 2d §§302B, 448-49.

The New York Court of Appeals has stated the rule as follows:

> "In this regard, it was plaintiffs' burden to show that defendants' conduct was a substantial causative factor in the sequence of events that led to [the] injury (see Restatement, Torts 2d, §430; Prosser, Torts [4th ed.], §42). Of course, the fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard (see Restatement, Torts 2d, §§302B, 449; Prosser, Torts [4th ed.], at pp. 271-272)." *Nallan* v. *Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520-21, 407 N.E. 2d 451, 459, 429 N.Y.S.2d 606, 614 (1980).

Thus, the first step of analysis is whether defendant's conduct was a substantial factor in bringing about plaintiff's harm. In other words, the Court must determine whether a reasonable person would regard BMW/NA's negligence a cause of Cullen's harm in the sense that it was

"responsible" for the injury. *Hoggard* v. *Otis Elevator Co., supra,* 52 Misc. 2d at 707, 276 N.Y.S.2d at 686; Restatement of Torts 2d §431, Comment (a), at 429.

Here, the evidence shows that BMW/NA created a situation which afforded Bavarian the opportunity to defraud or steal from customers relying on the good reputation of BMW. Cullen walked into the showroom specifically relying on the publicly displayed BMW logo as representing a particular level of quality product. The situation was such as to give him no notice of any deficiency in the franchise or Bavarian's relationship with BMW. BMW/NA, on the other hand, was well aware of Bavarian's impairment of BMW's reputation through various acts enumerated in the letter of December 18, 1978, yet it failed to take the available steps to prevent the further misuse of the BMW name and the misrepresentation that Bavarian continued to be an authorized BMW dealer. Moreover, knowing Bavarian's tenuous situation after expiration of the dealer agreement on December 31, 1978, BMW/NA failed to supervise its business dealings, thereby allowing Cullen to transact business with a "paper" BMW dealership lacking any tie with BMW whatsoever. These facts show that BMW/NA's conduct constituted a "substantial causative factor" in plaintiff's harm.

The second step under *Nallan* v. *Helmsley-Spear, Inc., supra,* requires the Court to determine whether Bavarian's intervening act was itself a foreseeable risk of BMW/NA's negligence. Stated differently,

> "a wrongdoer must answer for all the consequences that may ensue in the ordinary course of events, even

though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated to produce the injurious result. The type of intervening cause which relieves the original wrongdoer is a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated." *Hoggard* v. *Otis Elevator Co., supra,* 52 Misc. 2d at 708, 276 N.Y.S.2d at 687-88 (citations omitted).

The facts in evidence show that BMW/NA had knowledge of at least five recent incidents prior to Cullen's in which Bavarian had received partial payment for automobiles and had not delivered the cars. In some of these cases, Bavarian had issued checks on insufficient funds to refund the payments. Although the customer complaints were subsequently resolved, BMW/NA was apprised of Bavarian's propensity for unscrupulous business transactions. In this light, Eichler's conduct perpetuated rather than interrupted the "natural sequence of events" stemming from defendant's negligence. Moreover, "the exact occurrence or the precise injury" need not be foreseen. *Horstein* v. *General Motors Corp.*, 391 F. Supp. 1274, 1277 (S.D.N.Y. 1975). BMW/NA should have reasonably foreseen that Bavarian might have intentionally caused some financial harm to some BMW customer as a result of its original negligence, and this is sufficient.

According to the foregoing, judgment is entered for plaintiff in the amount of $18,000 plus interest thereon at the rate of 12% from April 13, 1979. Based on the evidence adduced at trial, punitive damages do not seem appropriate.

So Ordered.

The Clerk of the Court is directed to enter judgment for plaintiff and to forward copies of this memorandum decision and order to counsel for the parties.

/s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
October 28, 1981

APPENDIX B

Memorandum and Order of the District Court (May 16, 1980)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

79 C 970

THOMAS W. CULLEN, JR.,

Plaintiff,

against

BMW OF NORTH AMERICA, INC.,

Defendant.

Appearances:

LOUIS J. CASTELLANO, JR., ESQ.
Attorney for Plaintiff

WEIL, GOTSHAL & MANGES
Attorneys for Defendant
By KEVIN P. HUGHES, ESQ.
YVETTE MILLER, ESQ.

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NEAHER, District Judge.

Plaintiff in this action seeks to recover approximately $18,000 he paid to Bavarian Auto Sales, Inc. ("Bavarian"), then a franchised BMW dealer, for the purchase of a new automobile he never received. The undisputed facts reveal that plaintiff and Bavarian entered into a sales contract on January 24, 1979, and plaintiff promptly remitted the full purchase price upon Bavarian's representation that the vehicle had arrived and was being serviced. After Bavarian failed to keep its part of the bargain and deliver the BMW automobile, plaintiff commenced a civil action against Bavarian in New York State Supreme Court, Nassau County, which was stayed when Bavarian's president, Hans Eichler, filed a petition in bankruptcy in Connecticut. This diversity action against BMW of North American ("BMW/NA"), a New Jersey corporation, followed.

The amended complaint asserts four causes of action, presenting four separate theories of recovery. The first is based upon an agency theory: it is claimed that defendant as manufacturer and distributor of BMW vehicles is responsible for the actions of Bavarian either pursuant to principles of apparent authority or agency by estoppel. The second cause of action sounds in negligence based primarily on the defendant's alleged knowing tolerance of a financially unstable dealer for months prior to plaintiff's order. Plaintiff's third cause of action alleges a conspiracy between Bavarian and defendant to defraud customers of Bavarian, and the fourth cause of action claims that BMW/NA's conduct in the circumstances constituted a prima facie tort. The action is now before the court on defendant's

motion for summary judgment pursuant to Rule 56, F.R. Civ.P. For the following brief reasons, defendant's motion is granted in part and denied in part.

Summary judgment may be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. In determining whether to grant a motion for summary judgment, the court "cannot try issues of fact; it can only determine whether there are issues to be tried." *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967), *quoted in Securities Exchange Commission* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). It must accept as true factual statements in the opposing party's affidavits, draw all permissible inferences in that party's favor, *Hill* v. *A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976), and resolve any doubts in favor of the latter, *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc., supra.*

"The very mission of the summary judgment procedure [however] is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Adv. Com. Note to Proposed Amendments to Rule 56(e), 31 F.R.D. 648 (1962). As the Court of Appeals for this circuit recently stated:

> "Thus, the mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party. *See Gatling* v. *Atlantic Richfield Co.*, 577 F.2d 185, 187-88 (2d

Cir. 1978), *cert. denied*, 439 U.S. 868 (1979). The litigant opposing summary judgment, therefore, 'may not rest upon mere conclusory allegations or denials' as a vehicle for obtaining a trial. *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). Rather, he must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980).

With these principles in mind, it is the court's view that summary judgment dismissing plaintiff's third and fourth causes of action sounding in conspiracy and prima facie tort is appropriate but that resolution of the remaining claims must await further development of the record.

Turning first to plaintiff's negligence claim, it is manifest that genuine issues as to material fact preclude a grant of summary judgment. The basis of the claim is that defendant permitted Bavarian to continue as a BMW dealer —and to sell plaintiff an automobile on January 24, 1979— with knowledge of Bavarian's allegedly precarious financial condition. Notwithstanding evidence in the record to the contrary, plaintiff has successfully opposed the motion with ample evidence from which a trier of fact might infer that BMW/NA had knowledge of Bavarian's financial difficulties and might conclude defendant unreasonably permitted Bavarian to continue to hold itself out as an authorized dealer. Plaintiff has submitted a number of letters from defendant to Bavarian excepting to various business practices, among them Bavarian's apparently chronic habit of presenting checks which were later dishonored, and indicating defendant's awareness of Bavarian's financial difficulties and in-

tention to monitor the situation closely. He has also presented defendant's customer relations forms attesting to various customer complaints about Bavarian's conduct. Finally, plaintiff has submitted a letter from BMW/NA to Bavarian dated December 18, 1978, in which defendant at great length chronicles Bavarian's deficiencies and concludes in the following manner:

> "However, if you are interested in continuing as a BMW dealer, please contact us by January 5, 1979 to discuss with you in greater detail the deficiencies cited above and the action which would have to be taken by you in order to rectify such deficiencies. If we can reach a satisfactory understanding with respect to these matters, we will send you a written confirmation of our intention to offer you a 1979 dealer agreement, which confirmation will set forth in detail the deficiencies to be rectified, the corrected measures to be taken and the time period in which this may be accomplished.
>
> "Should we fail to hear from you by the 5th of January, please be advised that we shall consider your failure to respond as a voluntary termination of our relationship. . . ." (Letter of Friedrich Hanau, dated December 18, 1978.)

The record appears to indicate that defendant took no action to terminate officially Bavarian's relationship from January 5, 1979, until at least January 24, 1979, the date plaintiff purchased his BMW. At the time of plaintiff's purchase, Bavarian continued to operate under the BMW logo and in the same manner as before, although defendant was aware that Bavarian had received no new automobiles for several months and had no floor plan to pay for them.

On this record, plaintiff contends defendant breached a duty to him by permitting Bavarian to continue to hold

itself out as a BMW dealer until its voluntary resignation on February 16, 1979. Defendant argues that, assuming it owed a duty to plaintiff and had knowledge of Bavarian's unstable financial condition, it nonetheless cannot be held liable as a matter of law since plaintiff's injury was not foreseeable. Defendant claims that it cannot be held negligent because of the intervening, unforseeable criminal act of its "agent." While apparently a correct statement of New York law, see, *e.g., Ward* v. *State*, 366 N.Y.S.2d 800, 807 (Ct. of Claims 1975); *Smith* v. *ABC Realty Co.*, 336 N.Y.S.2d 104 (App. Term 1st Dept. 1972); *Tirado* v. *Lubarsky*, 268 N.Y.S.2d 54 (Civ. Ct. Bronx Cty.), *aff'd*, 276 N.Y.S.2d 128 (App. Term 1st Dept. 1966); *cf. Sherman* v. *Concourse Realty Corp.*, 365 N.Y.S.2d 239 (2d Dept. 1975), its applicability in the circumstances of this case is uncertain since defendant has failed to establish on this motion that criminal conduct was involved in Bavarian's failure to deliver an automobile to plaintiff. The record is bare of evidence that criminal conduct rather than irresponsible management of Bavarian was the cause of plaintiff's injuries. Assuming the latter and defendant's knowledge of such management, BMW/NA cannot escape a trial on the issue of its negligence by characterizing Bavarian's conduct as criminal or accusing its president of absconding with plaintiff's money. It appears resolution of the negligence issue must be left to the trier of fact.[1]

1. We have also considered defendant's arguments concerning its obligations under various State and federal laws regulating the relationship between motor vehicle manufacturers and distributors and their franchised dealers. The claim is made that under the Federal

(footnote continued on next page)

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Having determined that plaintiff's negligence theory must be left to a trier of fact, the court is of opinion that plaintiff's agency theory, although exceedingly broad in its present form, must also await further development of the record. Plaintiff suggests that under either an apparent authority theory or by application of the doctrine of agency by estoppel he is entitled to relief. Defendant persuasively argues, however, that principles of apparent authority do not readily apply in this case: there is no evidence that an actual agency relationship existed and that defendant permitted Bavarian to exceed the limited bounds of that agency. On the other hand, the principle of agency by estoppel is colorably applicable. Although no actual agency relationship exists, such an agency may arise where the party charged as principal permits the putative agent to act in such a manner that a reasonable man might infer that an agency relationship in fact existed. See Restatement of Agency §8, comment (d) (1958); 2 N.Y. Jurisprudence, Agency §§25, 87. See also *S.S. Silberblatt, Inc.* v. *Seaboard Surety Co.*, 417 F.2d 1043, 1049 (8th Cir. 1969). Agency by

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Dealer-Day-in Court Act, 15 U.S.C. §§1221-1225, and New York Gen. Bus. Law §§195-197A, defendant owed Bavarian the opportunity to fulfill its obligations under their agreement and hence its right to terminate the agreement was severely restricted. The argument is unpersuasive in the circumstances.

There can be little doubt that a manufacturer's duty to deal in good faith with its franchised dealers does not, standing alone, relieve it of duties, if any, owed to ultimate consumers to prevent foreseeable harm. In any event, issues of fact preclude summary judgment on the ground that defendant was duty bound not to terminate Bavarian at any time prior to plaintiff's transaction with Bavarian.

Finally, defendant has neither argued nor presented authority for the proposition that it had no duty to protect plaintiff against the risk of harm in the circumstances of this case.

estoppel may arise if "the person sought to be charged intentionally or carelessly caused the plaintiff to believe in the authority of the purported agent." *Karavos Compania, etc.* v. *Atlantica Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978).

The record here is clear that Bavarian was an independently owned and operated dealer, authorized to sell BMW automobiles among others. Plaintiff contends that in purchasing the automobile from Bavarian he relied on defendant's reputation for manufacturing quality products and for business integrity. Of greater relevance to the issue of agency by estoppel, plaintiff claims BMW/NA permitted Bavarian to display prominently the BMW logo on its premises, in advertising and promotional campaigns, and on Bavarian's stationery and sales invoices in accordance with "reasonable suggestions set forth by BMW/NA." Dealer Standard Provisions §4(c). The record reveals that Bavarian's sales slips clearly read "Bavarian Auto Sales and Service, Inc." and these words were flanked on either side by the BMW logo. The Bavarian stationery contained, moreover, the words "authorized sales and service" beneath the BMW logo. Plaintiff asserts that under these circumstances a man of reasonable prudence could conclude that Bavarian was BMW/NA's agent.

Defendant relies primarily on *Oberlin* v. *Marlin American Corp.*, 596 F.2d 1322 (7th Cir. 1979), and *Stalzer* v. *Ford Motor Co.*, 180 N.Y.L.J. 109 (Nassau County Sup. Ct., December 8, 1978), at page 15, column one, to support its claim that summary judgment is appropriate. Such reliance is misplaced. In *Oberlin*, defendant agreed to market products made by a company called "Melabs." Plaintiff en-

tered into an agreement with defendant to act as zone distributor of Melabs' products. When a dispute arose, plaintiff sued defendant and SCM Corporation, which had just taken over Melabs, on the theory that defendant was an agent of Melabs because it sold its goods. The court of appeals rejected plaintiff's agency by estoppel theory stating that defendant's advertising clearly indicated that Melabs was the manufacturer of the products and defendant was merely a distributor. Hence, no agency by estoppel could be inferred. In *Stalzer*, the court found that the purchase order signed by plaintiff was clearly marked with the dealer's name exclusively and that no representation from which an inference of agency could be drawn had been made by the dealer. Plaintiff's conclusory allegation of agency was unsupported by evidentiary fact and therefore insufficient to withstand a motion for summary judgment.

In contrast, plaintiff has suggested that the basis for his agency by estoppel claim is in Bavarian's sales invoice and various signs and use of the BMW logo. BMW stands for Bayerische Motoren Worke or Bavarian Motor Works. Unlike the situation in *Oberlin* and *Stalzer*, in which the entities were clearly separate and distinct, Bavarian Motor Works and Bavarian Auto Sales and Service, Inc., are sufficiently alike—taken together with other indicia of agency—as to make summary judgment on plaintiff's contention that an agency by estoppel arose inappropriate at this time. Although the claim might be difficult to establish at trial, plaintiff should have the opportunity to present the issue to a trier of fact. Nothing in the court's comments, of course, should be construed as an opinion on the merits of this or any other claim.

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Finally, little discussion is needed to dispose of plaintiff's remaining claims. It is well settled in New York that civil conspiracy to commit fraud, standing alone, is not actionable. See, *e.g., Ghazoul* v. *International Management Services, Inc.*, 398 F. Supp. 307, 311-12 (S.D.N.Y. 1975), *quoting Brackett* v. *Griswold*, 112 N.Y. 454, 466-67 (1889); see also *Taylor* v. *Cowit*, 244 N.Y.S.2d 845, 846 (Bronx Sup. Ct. Spec. T. 1963), *modified*, 246 N.Y.S.2d 962 (1st Dept. 1964). Any claim of fraud, moreover, is insufficient. Plaintiff must show misrepresentation, concealment or nondisclosure of a material fact, intent to deceive on the part of the defendant, justifiable reliance upon the misrepresentation and injury as a result of such reliance. See, *e.g., Van Alen* v. *Dominick & Dominick, Inc.*, 441 F. Supp. 389, 403 (S.D.N.Y. 1976), *aff'd*, 560 F.2d 547 (2d Cir. 1977); *Horowitz* v. *Sprague*, 440 F. Supp. 1346 (S.D.N.Y. 1977). There is no evidence to support such a claim. Nor is there evidence of "intentional infliction of harm, done with the purpose to injure the plaintiff, without economic or social justification, by means which would be lawful but for the malicious intent." *Effective Communications West, Inc.* v. *Board of Co-op. Ed.*, 395 N.Y.S.2d 296, 299 (4th Dept. 1977), *quoting Ruza* v. *Ruza*, 146 N.Y.S.2d 808, 811 (1st Dept. 1955). See also *Board of Educ. of Farmingdale Union Free School Dist.* v. *Farmingdale Classroom Teachers Ass'n., Local 1889*, 38 N.Y.2d 397, 405-06 (1975). Plaintiff's causes of action in conspiracy to commit fraud and prima facie tort must therefore be dismissed.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted as to plaintiff's third

and fourth causes of action but denied as to the first and second causes.

So Ordered.

The Clerk of the Court is directed to furnish copies of this memorandum and order to counsel for the parties. Counsel are directed to appear for a pre-trial conference in accordance with the court's practice to be held in Chambers, Room 252, on June 5, 1980, at 4:00 p.m.

/s/ Edward R. Neaher

U. S. D. J.

Dated: Brooklyn, New York
May 16, 1980